13 APRIL 1948

I N D E X

Tuesday, 13 April 1948

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Court House of the Tribunal
War Ministry Building
Tokyo, Japan

The Tribunal met, pursuant to adjournment, at 0930.

Appearances:

For the Tribunal, all Members sitting, with the exception of: HONORABLE JUSTICE LORD PATRICK, Member from the United Kingdom of Great Britain, not sitting from 0930 to 1600; HONORABLE JUSTICE JU-AO MEI, Member from the Republic of China, not sitting from 0930 to 1045.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

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(English to Japanese and Japanese to English interpretation was made by the Language Section, IMTFE.)

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now in session.

THE PRESIDENT: All the accused are present except UMEZU and SHIRATORI, who are represented by counsel. The Sugamo Prison surgeon certifies that they are ill and unable to attend the trial today. The certificates will be recorded and filed.

Mr. Levin.

MR. LEVIN: Mr. President, I would like to present Dr. KUSANO, who will continue the defense summation on personal responsibility. As I understand it, th.. TOGO and UMEZU summations are not quite ready, and this, I believe, will fill the gap, if it is agreeable with the Tribunal.

THE PRESIDENT: Dr. KUSANO.

DR. KUSANO: Mr. President and Members of the Tribunal:

1. The object of this summation is to analyze the alleged criminal responsibility of all the defendants from the point of view of modern criminal law.

The chief prosecutor said in his opening statement as follows:

"Since the usual definition of murder in civilized countries is the intentional killing of a human being without legal justification, we should

perhaps see what constitutes legal justification. This justification is usually limited to the defense of one's person or property or, perhaps, in the case of an execution, that he was merely carrying out the order of a properly constituted court."(1)

The question of legal justification is, of course, important, but such can be understood only when the question of "intention" is taken into consideration at the same time. Unfortunately, however, the chief prosecutor left the latter entirely out of his discourse, as if the criminality of the defendants' intention is taken for granted.

2. Even in the case where an act has come within the purview of certain conditions defining a crime and was done without any cause of legal justification, mentioned by the chief prosecutor, still the person who committed the act will incur no criminal responsibility, unless three more requirements are fulfilled: that is, (a) he has been mentally competent to take such responsibility, (b) the act was committed with criminal intent (as a rule) or through criminal negligence (in exceptional cases), and (c) there existed, at the time of commission of the act, a possibility of expecting him not to commit such an act. I shall hereunder

(1) Tr. 425.

consider the said three requirements seriatim.

3. In reference to the defendants in the present trial, it will not be necessary to dwell upon their mental competency to take responsibility for their acts, except the case of OKAWA. There is no doubt that each of them has had "the competency to discern the illegality of his conduct or to act according to his discernment of illegality of the conduct."(2)

4. As to criminal intent and negligence, Professor Sayer deplores in his treatise on "Mens Rea":

"It is almost hopeless to give an accurate definition of the term mens rea because of the diversity of its construction in judicial decisions and theories."(3)

In view of this remark, I wish, first of all, to determine the basis of my argument by briefly reviewing legislations of those countries which have adopted the most up-to-date principles of criminal law.

5. Article 38 of the present Japanese Criminal Code provides in paragraph 1:

"No act done without criminal intent shall be punished, except in the case where it is otherwise provided specifically by law."

Paragraph 3 of the same article reads:

(2) Article 10, Swiss Criminal Code.
(3) Sayer: "Mens Rea," Harvard Law Review, Vol. 45, 1931-32, p. 974.

"Ignorance of law cannot be invoked to establish the absence of criminal intent, but the punishment may be reduced in consideration of the extenuating circumstances."

The said paragraph 1 is the codification of the maxim: "Actus non facit reum nisi mens sit rea," while the said paragraph 3 is the embodiment of the saying: "Ignorantia juris non excusat." Moreover, the said paragraph 1 is derived from Article 77. Paragraph 1 of the old Japanese Criminal Code, which was almost similar in the wording,(4) and the said paragraph 3 is a modification of Article 77, paragraph 4, of the old code.(5) Since Article 77 of the old code provided in its paragraph 2 that: "No person shall be punished in the case where he committed a crime without knowing the facts which constitute the crime," the term "criminal intent" has been construed by the majority of judicial decisions as "knowledge of facts which constitute a crime."

6. According to this interpretation, criminal intent is established where the person in question knew the facts which constituted the crime, i.e., his act and

(4) "No act done without criminal intent shall be punished, except in the case where its punishment is provided specifically by law or regulations."
(5) "Ignorance of law or regulations cannot be invoked to establish the absence of criminal intent."

the natural and probable consequence thereof, but, when such knowledge is once proved, it is not necessary to further enquire whether or not he was aware of the illegality of his act. As the result of this interpretation also, mistake of fact is sharply divided from mistake of law. In the former case, criminal intent is entirely precluded. In the latter case, while mistake of criminal law does not preclude criminal intent, mistake of non-criminal law does so preclude, on the presumption that mistake of non-criminal law is nothing but mistake of fact. For illustration of this interpretation, a judgment of the Japanese Supreme Court is quoted as follows:

"When a person destroyed the seal and markings of attachment affixed to an attached object in the mistaken belief that the attachment had lost its effect by his payment of debt, his intention to commit the crime (of Article 96 of the Criminal Code) is precluded."(6)

7. In the above-mentioned case, there is no doubt that the act was committed by mistake of civil law. Can we, however, so hastily conclude as to say that the act was done without knowledge of the facts which constitute the crime? Is it not more natural to construe

(6) Judgment of Feb. 22, 1926, by the Second Criminal Division, Supreme Court. Report, Criminal, Vol. V, p. 97.

that criminal intent is precluded, not because mistake of civil law has brought about ignorance of facts which constitute the crime, but because, in spite of the offender's knowledge of such facts, mistake of civil law has amounted to ignorance of illegality of his act?

8. Professor Hafter of the Zurich University, after discussing the theories and judicial decisions in Switzerland upon the subject of criminal intent, remarks as follows:

"Illegality is the essential element in the conception of crime. It does not matter whether it is expressly stated as legal constituent of each crime. If we couple this principle with another that criminal intent must be related with every factor of a crime, we cannot but arrive at the conclusion that the criminal must be conscious of the illegality of his action. To deny this is to surrender to the tyranical force which belittles mistake of law. In this connection, a brief explanation will be required. Consciousness of illegality of one's act does not mean the knowledge of his acting contrary to certain provisions of law . . . . It is quite unnecessary that he should be aware of any particular norm of criminal law. It is necessary, however, that his idea as layman, i.e., his sense of law, should inform him that he is committing an act which is

not permissible. . . . . Only when a person has such consciousness of illegality, may he be adjudged guilty on the ground that his act was done with criminal intent. The axiom of no punishment without responsibility demands this. Though it will seldom happen in the commission of a crime, in the case where a person had no knowledge of his act being contrary to his duty and not permissible and where the impossibility of having such knowledge is actually proved in consideration of his whole personality, it is a shame to adjudge him guilty, however light the punishment may be."(7)

9. Professor Hafter further contends:

"All attempts are futile to make distinction between mistake of fact and mistake of law. Much more so, between mistake of criminal law and mistake of non-criminal law. It is too difficult to draw a line between the two. From the viewpoint of criminal responsibility, mistake as to the criminal nature of one's act must be taken into consideration. In the case where an abductor did not know the age of the abducted girl, or where a person was not aware of the fact that he was harboring a murderer, or where a school teacher mistakenly exercised his right of discipline . . . no criminal intent

(7) Hafter: "Lehrbuch des Schweizerischen Strafrechts," allg. teil, 1926, S. 117, S. 118.

should be recognized, if his bona fides is proved beyond reasonable doubt. On the other hand, we need not consider his mistake in the punishability of his act, or its legal nature; e.g., whether larceny or embezzlement, or the degree or conditions of punishment, or the existence of certain requirements of legal proceedings, etc."(8)

10. The above-mentioned case of abduction will be illustrated by R. V. Prince of 1875 in England. Prince had abducted from her father a girl under the age of sixteen; but in the belief, on adequate grounds, that she was eighteen, in which case the abduction would not have been a crime. The great majority of the judges agreed, however, in the view that "an intention to do anything that is wrong legally," even as a mere civil tort and not as a crime at all, would be a sufficient mens rea. Some judges went even beyond this; laying down a view, according to which there is a sufficient mens rea wherever there is "an intention to do anything that is wrong morally," even though legally it be quite innocent, both criminally and civilly.(9) Although Professor Sayer criticizes this case as having confused and unsettled the law more than any other upon the

(8) Hafter: Op. Cit. S. 184.
(9) Kenny: "Outlines of Criminal law," 14th Ed., 1933, pp. 41-42.

subject,(10) can we not interpret the said opinions of the English judges as their recognition of the knowledge of illegality to be the essential factor of mens rea?

11. This idea will become more clear, if we look into the question of negligence. According to Professor Kenny, "the mere fact that there was some degree of negligence on the parent's part will not suffice. There must be a wicked negligence, a negligence so great as to satisfy a jury that the prisoner did not care whether the child died or not."(11) He remarks further that "when motorists are sued in civil actions for negligence, the verdict is usually against them, but is rarely so in prosecutions of them for manslaughter. There must be a wicked negligence -- such disregard for the life and safety of others as to deserve punishment."(11) It follows, therefore, that negligence, punishable under criminal law, is not a simple carelessness, but must be wicked or blameworthy. In this sense, it may be said that the difference between criminal intent and criminal negligence is only a matter of degree of knowledge of illegality.

12. In my submission, the above-mentioned views of the English jurists are the positive side of a

(10) Sayer: Op. Cit. p. 1025.
(11) Kenny: Op. Cit. p. 122.

principle of the modern criminal law, that is to say, that mens rea should be determined by the presence of knowledge of illegality; while the said opinion expressed by Professor Hafter forms the negative side of the same principle, that is to say, that mens rea will be precluded in the absence of knowledge of illegality. If we read again, with this consideration in mind, the maxim of Ignorantia juris non excusat,(12) it will mean: (a) a person shall be punished for his act, if he was aware of the illegality of his act, in spite of his ignorance of law, (b) even in the case where he was not aware of the illegality of his act, he shall be punished, if he was negligent in having been unaware of the illegality of his act and if such negligence is blameworthy, and (c) in the case where he was not negligent or, if negligent, not sufficiently blameworthy for such negligence in having been unaware of the illegality of his act, he shall not be punished, even though he had knowledge of the facts which constitute a crime.

13. Professor Radin remarks as follows:

"Mens rea in English law was never held to mean that ignorance of criminal law was an excuse. In the German common law down to the end of the 19th century, the rule was error juris non excusat. Under the influence

(12) Japanese Criminal Code, Article 38, paragraph 3.

of Feuerbach, the excuse was later actually admitted for several decades with the result that there set in a sharp reaction, which has restored the old rule in modern German law. In France, exceptions are made in very unusual circumstances. The Norwegian Code, however, provides that where there is a mistake of law the punishment may be decreased or even abrogated altogether. In fact, many of the continental theorists are in favor of abrogating or at least modifying the generally-prevailing old rule, and some of the recent drafts of penal codes provide for milder punishment."(13)

14. In stating this, Professor Radin must have had in mind the draft of the Swiss Criminal Code in 1918. However, almost every legislation of the later date provides that mistake of illegality may be the ground not only for the reduction but for the exemption of punishment. It is true that Article 18 of the said Swiss draft recognized only mitigation in the case of mistake of illegality.(14) But the actual Criminal Code, promulgated in 1937, provides in Article 20 as follows:

"Where a person committed an act with a good reason to believe that he had a right to do the act,

(13) Radin: "Intent" in Seligman's Encyclopaedia of the Social Sciences, Vol. VIII, p. 129.

(14) "If a person committed a crime in the belief that he had a right to do the act, punishment may be reduced."

punishment may be reduced or remitted at the discretion of the judge."(15)

15. Looking back to the Chinese Tentative Criminal Law which existed prior to 1928, Article 13, paragraph 2, provided as follows:

"Ignorance of law cannot be invoked to establish the absence of criminal intent, but punishment may be mitigated by one or two degrees in consideration of the extenuating circumstances."

The above was amended by the old Criminal Code of 1928, Article 28 of which read as follows:

"Ignorance of law shall not discharge any person from criminal responsibility; provided however that punishment may be reduced by one-half in consideration of the extenuating circumstances."

Now, the present Chinese Criminal Code, which has come into force since 1935, provides in Article 16 as follows:

"Ignorance of law shall not discharge any person from criminal responsibility; provided however that punishment may be reduced in consideration of the extenuating circumstances. In the case where a person believed that his act was permissible by law and where

(15) This Article 20 of the Swiss Criminal Code follows literally the provisions of Article 17 of the Swiss Military Criminal Law of 1927.

there was a good reason for him so to believe, punishment may be remitted."

The above changes in Chinese law clearly demonstrate the gradual transition from the formal interpretation of ignorance of law to the real understanding of the principle of noncognizance of illegality.

16. The reason why I have in the above discussed at length this rather elementary principle of criminal law is because Professor Kenny maintains that a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. He states:

"The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require. Thus larceny can only be committed when a thing is stolen without even the appearance of right to take it; and, accordingly, a bona fide and reasonable mistake, even though it be of law -- like that of a woman who gleans corn in a village where it is the practice to do so -- will afford a sufficient defense. Similarly a mortgagor who, under an invalid but bona fide claim of right, damages the fixtures in the house which he has mortgaged, will not be guilty of 'malicious' damage. Apart, however, from such exceptional offenses, the rule which ignores mistakes of law is applied with rigour."[16]

16. Kenny: Op. Cit. pp. 69-70.

17. On the other hand, he remarks:

"But I know of no reported decision which extends this rule to mere municipal by-laws. Both in England and in the United States (Porter v. Waring, 69 N. Y., 250) a judge would require legal proof of a by-law before enforcing it. Should the law attribute to ordinary people a greater legal knowledge than to the judge?"[17]

Admitting that this Honorable Tribunal might take judicial notice of the fact that there is a large body of international law, known at different times and by different writers as the "common law" or "general law" or "natural law" of international law,[18] I respectfully submit that it is a law less clear and definite than a national law and that acts in contravention of international law are deemed by any national law not sufficiently blameworthy to incur criminal responsibility, except in a few cases. According to Professor Kenny, it is expounded as follows:

"The student must bear in mind that, though it is sometimes said that 'International Law is part of the laws of England,' this is true only in that loose historical sense in which the same is also said of

17. Kenny: Op. Cit. p. 68, Note 4.
18. Mr. Keenan, Opening Statement, T. 405-6.

Christianity. But an indictment will not lie for not loving your neighbor as yourself. Equally little will it lie for trading in contraband of war, or for the running of a blockade. Both these acts are visited by international law with the penalties of confiscation; but neither of them constitutes any offense against the laws of England, or is even sufficiently unlawful to render void a contract connected with it."[19.]

18. The above submission will be opposed by the contention that international law is a law sui juris and can punish any act which it deems fit upon the ground entirely different from any national law. It is said, however, by Lord Wright and quoted by the Chief Prosecutor as follows:

"In my earlier essay I pleaded to have it recognized that international law was the product, however imperfect, of that sense of right and wrong, of the instincts of justice and the humanity which are the common heritage of all civilized nations. This has been called for many ages 'Natural Law'; perhaps in modern days it is simpler and truer merely to refer to it as flowing from the instinctive sense of right and wrong possessed by all decent men, or to describe it as derived from the principles common to all

19. Kenny: Op. Cit. pp.334-335. As to the question of trading with the enemy, see p. 335, note 1.

civilized nations. That is, or ought to be, the ultimate basis of all law."[20]

In other words, even though "the source of international law must . . . be sought elsewhere than in the acts of a national law-making authority,"[20] it must have a foundation in the instinctive sense of right and wrong, common to all law. It must not be the law of the mighty or the conqueror.

19. The heretofore accepted definition of "international law" is that it governs relations between independent States.[21] It has been a matter of common sense to understand that: "Public international law is the body of rules which control the conduct of independent States in their relations with each other. It is altogether different in its nature from law in the narrower sense of the word, namely, law capable of judicial enforcement, for that implies a force superior to both the litigants or disputants; and as independent States have no recognized common superior, the rules by which their conduct is governed are incapable of enforcement except by war."[22] Even the Chief Prosecutor admits that "the personal

20. T. 407-8. 21. The S. S. Lotus (France v. Turkey), Permanent Court of International Justice, Sept. 7, 1927, cited in Hackworth: "Digest of International Law," 1940, Vol. 1, p. 2.

22. Byrne's Law Dictionary, 1923, p. 487.

liability of these high ranking civil officials is one of the most important, and perhaps the only new question under international law to be presented to this Tribunal.[23]

20. According to the Chief Prosecutor, it is said that the prosecution will "show that each and every one of the accused named in this indictment played an important part in these unlawful proceedings; that they acted with full knowledge of Japan's treaty obligations and of the fact that their acts were criminal."[24] In my submission, here lies the fallacy of his contention, for knowledge of treaty obligations is entirely a different question from knowledge of criminality of their acts. No modern national law would punish an individual for any breach of contract, whether be it intentional or unintentional. No international law has ever criminally punished an individual for any breach of treaties except perhaps in cases of the so-called conventional war crimes and pirates. Even then, the prosecution admits that "the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders."[25]

23. T. 435. 24. T. 422. 25. T. 39007.

21. Evidence adduced either by the prosecution or by the defense has definitely established the fact that all the defendants did their level best to carry out whatever treaty obligations they had to deal with in their respective capacities, not because they were aware of their criminal responsibility for not doing so, but because they wanted to keep the sanctity of the treaty itself. Any breach of treaty obligations, alleged by the prosecution, has been proved to have resulted from inevitable but unforseen circumstances. All acts of the defendant as indicated before this Tribunal, were done in pursuance of the laws of their country. If Professor Hafter is right in saying that "it is necessary that his idea as layman, i. e., his sense of law, should inform him that he is committing an act which is not permissible,"[26] how could the defendants have been informed by their sense of law that their acts were not permissible under international law at the same time when their very sense of law was telling them that their acts were permissible under their national law?

22. The learned judges in the McNaughten's case stated as follows:

26. See para. 9 supra.

"We are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime he was acting contrary to law: by which expression we understand to mean the law of the land."[27] If there was any conflict between the law of the land and international law, the judges would not hesitate to answer the superiority of the former. So would the defendants. But what I wish to emphasize is that not only the defendants had legal justification for their acts under their national law, but they honestly reasonably believed that their acts were justified under international law.

23. The prosecution contends, in its summation upon conspiracy, as follows:

"If he was in office at that time, allowed his scruples to be overruled, and continued in office, we submit that quite clearly he should be convicted, and that in a moral point of view his case is at least

27. McNaughten's Case, 1843, cited in Wilshere: "Leading Cases on Criminal Law," 3rd Ed., 1935, p. 31.

as bad as that of one who had no such scruples."[28]

And further it maintains, in its summation upon individual responsibility, in particular, of a cabinet minister, that:

"He always had alternative of resigning instead of casting his affirmative vote for, or expressing his acquiescence in an aggressive measure. If he did not resign despite his personal convictions because he felt more important that he or the cabinet continue in office, he is legally just as responsible and morally more responsible than an all-out proponent of the aggressive policy, since he deliberately chose to approve the policy with full cognizance and conviction of its evil."[29]

24. Such an accusation misses the mark entirely, so far as the defendants are concerned. During the period of the indictment, i. e., from January 1928 to September 1945, 17 cabinets rose and fell, the average life of a cabinet being only one year. How can we expect any consistent national policy, either aggressive or defensive, under these circumstances? The trouble with the defendant was not that they clung to their prominent posts despite

28. T. 39057.
29. T. 40554-5.

their personal convictions, but that they foresook such posts too readily, because of their sensitiveness to political responsibility, to carry out their policies. Did or should their sense of law inform them, at the time of their resignation, that they would be also responsible criminally under international law, if they did not resign? No sane man, even the most learned scholar of international law, would dream of such a fantasy, but that will be the only conclusion to be drawn from the logic of the prosecution. Whatever may be the case, the evidence adduced before the trial has proved that the defendant believed that their act were permissible both by the law of their land and by the laws of nations and that they had good reason so to believe. Even if they are to be adjudged by an ex post facto law as criminally liable under international law, their punishment should be remitted, should the principle embodied in the aforesaid Article 16 of the Chinese Criminal Code[30] be adopted.

25. Leaving aside for a moment the question of international law, I should like to discuss briefly the principle of criminal responsibility, which requires the existence, at the time of commission of an alleged

30. See para. 15, supra.

offense, of a possibility of expecting the offender not to commit such an act. Article 34 of the Swiss Criminal Code of 1937 is the best illustration of this principle and provides as follows:

"No person shall be punished for his act done in order to avert any impending and otherwise unavoidable danger to his right, in particular, to life, body, liberty, honor or property, if he is not responsible for the occurrence of such danger and if it is impossible to expect him to abandon his endangered right in view of the circumstances."

26. Article 37 of the Japanese Criminal Code reads as follows:

"No person shall be punished for his act inevitably done in order to avert any impending danger to his or any other person's life, body, liberty or property, if the evil arising out of his act does not exceed the degree of evil which he tried to avert; provided however that punishment as to the act in excess of such degree may be reduced or remitted in consideration of the extenuating circumstances."

The underlying thought of this provision is the same as that of the Swiss Code above referred to, i.e., criminal responsibility shall not be attributed to the case where it is impossible to expect a person to avert the evil by anything short of the commission of the offence in question.

27. Professor Kenny states as follows:

"The defence of necessity, however, can only be important where, as in capital offences, there is a prescribed minimum of punishment. For in all others every English judge would take the extremity of the offender's situation into account, by reducing the sentence to a nominal penalty. Yet where immediate death is the inevitable consequence of abstaining from committing a prohibited act, it seems futile for the

law to continue the prohibition, if the object of punishment be only to deter. For it must be useless to threaten any punishment, the threat of which cannot have the effect of deterring. Hence, perhaps, it is that in the United States the defence of Necessity seems to be viewed in favor".[31]

Although it may not be so prevalent as in continental countries, the English defence of Necessity is based, in the final analysis, on the same principle as mentioned above in reference to Swiss and Japanese laws.

28. As a further application of this principle, I refer to Article 105 of the Japanese Criminal Code, which provides as follows:

"In the case where a crime mentioned in this Chapter (i.e. harboring a criminal or suppression of evidence) is committed by a relative of a criminal or a fugitive for the benefit of the criminal or the fugitive, punishment may be remitted".

The harboring or suppression of evidence by a parent or a wife for the benefit of his or her child or her husband is, indeed, an inevitable manifestation of humanity, as expressed by Confucius in his Analects that "the true justice exists where a father conceals for the sake of his child and a child for his father".

31. Kenny: Op. cit. pp. 77-78.

It would be unreasonable and against human nature to expect him to act otherwise. A similar kind of law is found in England. If a husband who has committed a crime is received and sheltered by his wife, she is not regarded by the law as becoming by such "bare reception" an accessory after the fact or a participator in his treason; for she is bound to receive him.[32]

29. As another example of the same principle, Article 76 of the old criminal code of Japan provided as follows:

"A person, who has performed his official duty under his superior's order, shall not be punished".

The present Criminal Code has deleted such a provision on the ground that it is included in Article 35, which reads as follows:

"No act is punishable, which is done in accordance with the provisions of law or regulations or in pursuance of a legitimate business".

It corresponds to Article 32 of the Swiss Criminal Code of 1937 which provides as follows:

"Any act, which is required by law or by an official or business duty or permitted or declared not punishable by law, is neither felony nor misdemeanour".

32. Kenny: Op. cit. pp. 73-74
But a husband enjoys no similar exemption when he assists a felonious wife; he becomes accessory to her felong (Kenny: Op. Cit. p. 89).

30. In the Chinese Tentative Criminal Law, there was no such provision, but in Article 35 of the old Chinese Criminal Code of 1928, it was provided:

"No act is punishable, which is done in the course of an official duty under the order of one's superior officer".

Then, in Article 21 of the present Chinese Criminal Code of 1935, Articles 34 and 35 of the old Code are combined as follows:

"No act is punishable, which is done in accordance with law or regulations.

"No act is punishable, which is done in the course of an official duty under the order of one's superior officer, <u>except the case of a person who has known clearly the illegality of such order</u>".

The said Article 21, Paragraph 2 of the Chinese Code implies obviously the following two points: Firstly that no crime will be constituted by any act of a subordinate done under a legal order of his superior, and secondly that a subordinate shall not be held responsible for any act done under an illegal order of his superior, unless the subordinate knew clearly the illegality of the order.

31. In this connection, the French Criminal Code provides in Article 327 as follows:

"Murder, wounding or assault committed under the provisions of law and ordered by a lawful authority shall constitute neither felony nor misdemeanour".

And in Article 114, it is provided:

"A public official, agent or employee of the government shall be deprived of his civil rights in the case where he has ordered or committed any arbitrary act, or any act inimical to the individual liberty or to the civil rights of one or more citizens or to the Constitution.

"If, however, he proves that he has acted under the order of his superiors concerning matters within their jurisdiction, in which matters he is bound to the superiors by a chain of subjugation, he shall be exempted from punishment, etc."

32. In reference to criminal responsibility of a subordinate, Professor Donnedieu de Vabres enumerates three points of view: (a) The theory which maintains the irresponsibility of a subordinate on the ground that he is not allowed to criticize the legality of his superior's orders; (b) the so-called "la theorie des baionettes intelligentes", prevalent in the courts of the United States,[33] which have repeatedly refused to recognize any such irresponsibility

33. Kenny: Op. Cit. p. 73.

at all on the ground that a subordinate has the right (and duty?) to criticize the legality of his superior's orders; and (c) the theory which admits mitigation of punishment in the case where the content of such order was apparently legitimate and its formality was satisfactory.[34]

33. According to Professor Kenny, the official British Manual of Military Law admits it to be still "somewhat doubtful" (Chapter VIII, par. 95) how far a superior officer's specific command, even not obviously improper, will excuse a soldier from acting illegally.[35] Compared to such legislation, the said Chinese Criminal Code (Article 21, Paragraph 2) sweeps away any doubts by stating that punishment will be imposed only upon a subordinate who has acted with a clear knowledge of illegality of his superior's order. It follows, therefore, that in case there existed any ambiguity as to illegality of the order, he shall not be responsible, even if he carried out the order. Since the basic principle of officialdom lies in the chain of command and subjugation, especially in the case of the army and navy, it is according to the thinking of Chinese law, unreasonable to expect

34. Donnedieu de Vabres: "Traite elementaire de droit criminel", 1937, pp. 246-247. He seems to agree with the third view.
35. Kenny: Op. Cit. p. 73.

him to act contrary to his superior's order, even when he was not quite sure of its being either legal or illegal.

34. On the other hand, Professor Liszt contends that "so long as the absolute binding power of a superior's order is acknowledged by law, such an order will preclude the illegality of his subordinate's act done in accordance therewith", on the ground that "an act done in pursuance of one's duty is never illegal".[36] This contention is erroneous, because since the superior is held responsible for the execution of his illegal order, "the punishment cannot be linked with a legal act."[37] If the superior's order is illegal, we have to admit that the subordinate's act is also illegal. However, the impossibility of expecting him to act otherwise will exempt him from any wickedness or blameworthiness and hence from any criminal responsibility.

35. According to Professor Sayer, "the conception of blameworthiness or moral guilt is necessarily based upon a free mind voluntarily choosing evil rather than good; there can be no criminality

36. V. Liszt: "Lehrbuch des Dentschen Strafrechts", 21-22 aufl. 1919, §35, s. 146.
37. N. E. Mayer: "Der allgemeiner Teil des deutschen strafrechts", 1915, s. 334.

in the sense of moral shortcoming, if there is no freedom of choice or normality of will capable of exercising a free choice".[38] The Nurenberg Judgment ruled that "the true test...is not the existence of the order, but whether moral choice was in fact possible".[39] In my submission, these words are nothing but the enunciation of the principle of impossibility of expectation (Nichtzumutebarkeit).

36. The Nuremberg Judgment has brought this principle of criminal law into the field of international law. The relevant provisions of law considered by that Tribunal are articles 7 and 8 of its Charter which in combination correspond to article 6 of the Charter governing this honorable Tribunal. The difference between the said provisions of the two charters is that while in the Nuremberg Charter the official position of defendants, whether as heads of states or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment, and only the fact that they acted pursuant to order of their government or of their superiors may be considered in mitigation, the Tokyo Charter provides

38. Sayer: Op. Cit. p. 1,004.
39. Nuernberg Judgment, p. 16,881.

that both their official positions and the fact that they acted pursuant to order may be taken into consideration, if the Tribunal determines that justice so requires.

37. Now, the prosecution contends in its summation as follows:

"The defendants may be divided into three categories: (1) those defendants who had the ultimate duty or responsibility for policy formation fixed by the law of Japan; (2) those defendants, although they do not have the ultimate duty or responsibility, had the duty or responsibility for policy formation in a subordinate or intermediate capacity fixed by the law of Japan; and (3) those defendants who, although they had no duty or responsibility fixed by the law of Japan, have by their acts and statements placed themselves on the policy-making level and are therefore chargeable with responsibility in fact."[40]

As to the defendants of the first category, I have already shown in the above that their acts, done in accordance with the law of Japan and in the honest and reasonable belief that such acts would also be justified under international law, preclude any knowledge of illegality and, therefore, their

40. T. 10,342-3.

punishment should be remitted.

38. It is further submitted that under such circumstances as existed during the period of 17 years since 1928, no man could have acted otherwise than what the defendants did, should he have been placed in their stead. It was, indeed, humanly impossible for them to stop successive explosions of the long pent-up national sentiments, either at home or abroad. It was also humanly impossible for them to carry out direct control and supervision over numerous subordinates in remote corners of Manchuria, China and elsewhere. In short, can we expect them to exercise their authority and care to such an extent as to turn the tide of national destiny and to prevent the inevitable consequences of sanguine hostilities?

39. As to the defendants of the second category, there was in Japan the so-called Regulations for the Duty of Government Official,[42] which provided as follows:

"Article 1. Government officials shall, pledging their allegiance and assiduous services to His Majesty the Emperor and the Emperor's Government, obey laws and orders and discharge their respective duties.

41. See Para. 24, supra.
42. Ex. 3510, T. 34,003.

"Article 2. Government officials shall, with respect to their duties, observe the orders of their superior officials to whom they are assigned, provided however that they may express their opinions to such orders."

In the case of military men, a more special and vigorous duty was imposed upon them for observance of their superior's orders. Those who opposed or did not comply with such orders were severely punished as guilty of the crime of defiance under the Army Criminal Code (Arts. 57-59) or the Navy Criminal Code (Art. 55-57).

40. In any case, once a decision or an order was given by his superiors, a civil official or military officer was not allowed to act contrary thereto, whatever his personal opinion might have been. To expect him to act otherwise was, indeed, impossible. Even the Ministers of State and Commanders-in-Chief of various armies and fleets were, in that sense, subordinates to the Emperor. If an Imperial Sanction was issued, they could do nothing but obey it. That is why the Chiefs of Army and Navy General Staffs exercised a great influence not only in military affairs but in political matters by having direct access to the Throne.

41. Even if we assume, for the sake of argument, the existence of some criminal responsibility either under international law or under national law upon somebody in the political or military circles of Japan, it is impossible to attribute such responsibility to any person or body of persons, because in the 20th century Japan nobody has ever succeeded in obtaining a single post, much less power in the Government, by plots, revolutions and other unlawful means, such as seen in the history of Germany after the First World War. All plots and attempts of revolution were either nipped in the bud or suppressed. By whom? By the very defendants who now stand in the dock. Every one of them was appointed to his post in due course of his career and in pursuance of the laws and customs of Japan. None of them exceeded his authority or was negligent of his duties, prescribed by the regulations of his office. It is true that they belonged to the higher grade in the hierarchic structure of Japan, but it is also shown by evidence that there was no Hitler, no Mein Kampf, no Nazi Party or criminal organization among them.

42. As to the defendants of the third category, whatever popularity and influence they had were derived not from governmental or military sources,

but from ordinary citizens at large. They never were powerful enough to be able to force their will upon the politics of Japan. All they could do was to voice the people's sentiments in opposition to the then prevailing bureaucracy. Perhaps they dreamed about the Great East Asia Co-Prosperity Sphere and Asia for Asiatics, but their talks were puerile compared to the nation-wide movement of anti-foreignism in China. If the latter was not treated as an international crime even by the Lytton Report, why should the former be so condemned? If freedom of thought is to be one of the human rights under national law, why should international law try to stop it?

43. The underlying thought of the prosecution in thus accusing the defendants of the above-mentioned three categories is that a state is a fictitious existence, to which no criminal responsibility can be attributed.[43] The Chief Prosecutor declares that:

"Nations as such do not break treaties, nor do they engage in open and aggressive warfare. The responsibility always rests upon human agents;"[44]

and also that:

"All governments are operated by human agents, and all crimes are committed by human beings. A man's official position cannot rob him of his identity as an individual nor relieve him from responsibility for his individual offences."[45] Such a thought follows the maxim: "Societas delinquere non potest," but according to Professor Kearny:

"It is now settled law that corporations may, in an appropriate court, be indicted by the corporate name, and that fines may be consequently inflicted upon the corporate property."[46]

44. In England, the Interpretation Act, 1889 (52 and 53 Vict. c. 63, S. 2) provides that in the con-

43. Prosecutor Jackson: "The Case Against the Nazi War Criminals," 1946, p. 82.
44. Mr. Keenan, Opening Statement, T. 473
45. Mr. Keenan, T. 434-435
46. Kenny: Op. Cit., pp. 65-66

struction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression "person" shall, unless a contrary intention appears, include a body corporate. In the United States, the Criminal Code of New York of 1882 (Article 13) provides that in all cases where a corporation is convicted of an offence for the commission of which a natural person would be punishable with imprisonment, as for a misdemeanor, such a corporation is punishable by a fine of not more than five hundred dollars, as for a felony by a fine of not more than five thousand dollars. The Criminal Code of California of 1901 (Article 26a) provides that corporations are capable of committing crimes in the same manner as natural persons. This legislation is explained by a text book as follows:

"Under the theory that a corporation is in the language of Chief Justice Marshall 'an artificial being, invisible, and existing only in contemplation of law', it was doubted whether a corporation could be guilty of crime. The modern view tends to regard a corporation as a reality, a group of human beings, authorized by law to act as a legal unit, endowed for some purpose with legal personality."

47. Clark and Marshal: "A Treatise on the Law of Crimes", 4th ed., 1940, pp. 140-143.

And further: "Where conduct is sanctioned by the directors or officers in whom the corporate powers are vested, their intent should be considered the intent of the corporation. Such persons are more than agents for a natural principal. They embody and exercise the mental element essential for corporate action."[48]

"In other words, whenever a director's act is deemed to have been done for the interest of his corporation, his intention being also to act on its behalf, such act will be absorbed by the corporation and become its act, losing the identity of any individual's act."

45. There is no doubt that a State is a juristic person under either national law or international law, while a corporation is such under national law. If a corporation, which is nothing but a body of persons bound by a certain economic or social tie, can be a reality, competent to bear criminal responsibility, why cannot a State be more real and more competent than a corporation? Hackworth states as follows:

"The terms state and nation are frequently used interchangeably. The term nation, strictly speaking, as evidenced by its etymology (naci, to be

48. Ibid., p. 140

born), indicates relation of birth or origin and implies a common race, usually characterized by community of language and customs. The term state -- a more specific term -- connotes, in the international sense, a people permanently occupying a fixed territory, bound together by common laws and customs into a body politic, possessing an organized government, and capable of conducting relations with other states."[49]

46. A corporation has no territory nor people over which it can exercise its sovereignty, nor any natural affinity to bind them together, except a certain specific purpose which may be changed or given up at any time. On the other hand, a State is a foreordained existence and follows a course, which no single man, not even the seventeen cabinets in succession within seventeen years, can change or give up. A shareholder may sell out his shares of a corporation whenever he likes to do so, but the defendants could not back out from their duties imposed by their State. Any international obligations are executed or miscarried, not only in the name of the State but by the predestined course it takes. If it is defeated in a war, indemnities will be paid or territory be ceded. Are not such measures punishment for its

49. Hackworth, Op. Cit. Vol. I, p. 47.

responsibility under international law? Admitting that the sovereignty of a State should be subject to international law, it is respectfully submitted that no responsibility under international law should be attributed directly to any individual because of the following grounds.

47. The Japanese Law No. 125 of 1947, called as the State Redress Law (Article 1), provides as follows:

"If a public official entrusted with the exercise of the public power of the State or of a public entity has, in the conduct of his official duties, inflicted illegally with intent or through negligence any damage on other person or persons, the State or the public entity concerned shall be under obligation to make compensation therefor.

"If in the case referred to in the preceding paragraph the public official has perpetrated the act intentionally or through gross negligence, the State or the public entity concerned shall have the right to obtain reimbursement from the said public official."

The above provisions of the Japanese law are introduced for the purpose of democratization of the Japanese legal and political systems, but they do not recognize any direct claim against an official by an

afflicted party for any damage inflicted illegally in the course of the official's duties. This interpretation of the law is confirmed by the fact that the annexed rules to the said Law abolished as from October 27, 1947, Article 6 of the Public Notary Law, Article 4 of the Household Registration Law, Article 13 of the Real Property Registration Law, and Article 532 of the Civil Procedure Code, which provided a direct responsibility of a public notary, mayor of city or village, registration official or bailiff towards a party who suffered damage by an intentional or gravely negligent act of the former.

48. On the other hand, in the case of Johnstone v. Pedlar, 1921, Viscount Finlay said in the judgment of the British House of Lords:

"It is the settled law of this country, applicable as much to Ireland as to England, that if a wrongful act has been committed against the person or the property of any person the wrongdoer cannot set up as a defense that the act was done by the command of the Crown. The Crown can do no wrong, and the Sovereign cannot be sued in tort, but the person who did the act is liable in damages, as any private person would be.

"This rule of law has, however, been held

subject to qualification in the case of acts committed abroad against a foreigner. If an action be brought in the British Courts in such a case it is open to the defendant to plead that the act was done by the orders of the British Government, or that after it had been committed it was adopted by the British Government. In any such case the act is regarded as an act of State of which a Municipal Court cannot take cognizance. The foreigner who has sustained injury must seek redress against the British Government through his own Government by diplomatic or other means. This was established in 1848 in the well-known case of Buron v. Denman (2 Ex. 167.)"[50]

49. In Finck v. Minister of the Interior the plaintiff, a German who had been engaged in the business of bookselling in Cairo, Egypt, prior to October 1914, brought an action against the Egyptian Government for damages resulting from the sequestration of his property and the arrest and deportation of his agents. He alleged, inter alia, that the decision of the Council of Ministers of Egypt, on August 6, 1914, calling upon the Commander in Chief of the British troops in Egypt to undertake the defense of Egypt against any aggression of a power at war with Great Britain was ultra vires. The Court of First Instance of Cairo of the Mixed

50. 2 A.C. 262, 271, 272, 275, cited in Hackworth: Op. Cit., Vol. II, p.16.

Tribunals of Egypt rejected the claim for damages, stating that the decision of the Council of Ministers resulted in Egypt's being at war with Germany, that a declaration of war is in law an act of the sovereign power, that such power vested in the sovereign is exercised through its ministers, that therefore the decision emanated from the only authority competent to make it, that in law acts of this nature are called "acts of State", and that in principle such an act cannot be made the basis of an action for damages in respect to the injury it causes.[51]

50. This principle of acts of State should in no way be different whether the case is a civil action or a criminal action. According to the preliminary articles of the Hague Convention IV of 1907 (article 3), a belligerent party that violates the provisions of the regulations respecting the Laws and Customs of War on Land shall, if the case demands, be liable to pay compensation and that it shall be responsible for all acts committed by persons forming part of its armed forces. According to the judgment of In re Piracy Jure Gentium, 1934, it is expounded as follows:

"With regard to crimes as defined by international law, that law has no means of trying or punish-

51. 15 Gazette des Tribunaux Mixtes d'Egypte (Nov. 1924-Oct. 1925) 82; British Year Book of International Law (1925) 219; cited in Hackworth: Op. Cit., Vol. II, p. 19.

ing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country."[52]

51. It is respectfully submitted, therefore, that even if the defendant had been guilty of a criminal intent or of gross negligence in carrying out their official duties, all the accepted authorities upon international law would not recognize any direct responsibility upon them vis-a-vis foreign States or foreigners. How can international law impose any responsibility upon those who have done their duties in accordance with the laws of their land and in the honest and reasonable belief that their acts were also in conformity with the prevailing rules of international law? In this connection, I should like to refer to the Statute of the Permanent Court of International Justice (Article 38), which provides:

"The Court shall apply:

"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

"2. International custom as evidence of a general practice accepted as law;

52. A.C. 586, 589; cited in Hackworth, Op. Cit., Vol. I, p. 38

"3. The general principles of law recognized by civilized nations;

"4. Subject to the provisions of Article 57, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

52. If these defendants must, at any cost, be adjudged directly under international law for acts done in their official capacities, although there exists no such precedent,[53] it is my sincere wish that the Tribunal would take into consideration "the general principles of law recognized by civilized nations," in particular, those elementary principles of criminal law which are submitted in the above. Professor Holdsworth remarks that "primitive man is like the civilized State" and compares the criminal law of ancient times with the present state of international law.[54] I am convinced, however, that the international law which would be administered by this honorable Tribunal would be in no wise contrary to the sense of law developed by criminal

53. Mr. Keenan, T. 459
54. Holdsworth: "History of English Law," 3rd ed. 1923, Vol. II, p. 43.

legislations of modern civilized States.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1045, a recess was taken until 1100, after which the proceedings were resumed as follows:)

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Yelden

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Mr. Blakeney.

MR. BLAKENEY: I now sum up on behalf of the defendant TOGO. In reading the document I shall make a few verbal corrections which are to appear on an errata sheet to be circulated later.

GENERAL

1. There are several circumstances which are calculated to require the summing up of the case of TOGO, Shigenori at greater length than would ordinarily accord with the desires of court or of counsel. One of these circumstances--one quite extraordinary, and in this trial unique--raises questions so basic that it must be mentioned at the outset. The defendant TOGO is charged by 44 of the 55 Counts of the Indictment. Two of these the prosecution, after long shrinking from acknowledgment of the typographical error which in them had put "TOGO" for "TOJO,"[1] in January 1947 dismissed as to this defendant;[2] as to two others the charges "will not be pressed" by the prosecution,[3] which may be supposed to amount to a nolle prosequi.

1. Tr. 15827.
2. Counts 25 and 35 (Tr. 16121).
3. Counts 44 and 53, Summation, WW-1 (Tr. 41868); See also C-18 (Tr. 39050).

Of the remainder, 25 relate in whole or in part to the a tivities of Mr. TOGO prior to his becoming Foreign Minister in October 1941. It is from this condition that arise the basic questions mentioned above which perplex us to know what case we have to meet.

2. For after the TOGO defense was opened, the Chief Prosecutor arose to state to the Tribunal a limitation of the charges to be urged against this defendant in that the prosecution (subject to the reservation to be mentioned presently) "seeks conviction of the accused TOGO for his actions beginning with his assumption of duties in the TOJO Cabinet."[4] This limitation, which seems clear enough as it relates to the substantive charges, was subsequently acknowledged by the Chief Prosecutor to imply also that the prosecution did not charge the defendant TOGO with having joined in any conspiracy before he joined the TOJO Cabinet, which was in October 1941.[5] These were, of course, not idle words, spoken without consideration of their effect by the Chief Prosecutor, not an expression of opinion or of an inchoate future intention; they constituted the solemn, official

4. Tr. 35347.
5. Tr. 35352. "* * * with the further observation that, as a matter of law, it is our contention that he is guilty if he joined the conspiracy during October of 1941."

statement of the prosecution of its position in regard to the cause, its commitment to the case which it considered it possible and proper to submit to the Tribunal against this defendant. That commitment being stated to have been made "for the purpose of assisting the Tribunal in carrying out Article 12, paragraph (a) of the Charter, that part of it as follows: '* * * to confine the trial strictly to an expeditious hearing of the issues raised by the charges,'"[6] it should presumptively have been possible to rely on it for definition of the issues which the prosecution, who have the right and the power to frame them, would contend to have been made. The defense might reasonably have expected that the case which it would be called upon to meet would be a case limited to investigation of the criminality of Mr. TOGO's actions from the time of his becoming Foreign Minister in October 1941.

3. It is with surprise, therefore, that after the Chief Prosecutor's solemn abandonment of this large part of the charges stated in the Indictment against the defendant TOGO, we find almost one-quarter of his summation against this defendant[7] (as

6. Tr. 35347.
7. Summation, WW-2--WW-10 (Tr. 41868-86).

well as incidental passages in other summations) devoted to argument of the criminality of his acts in the years prior to his "assumption of duties in the TOJO Cabinet." It is with astonishment that we read his final submission, that "by the evidence in this trial the facts alleged by the prosecution in relation to the accused TOGO have been established and that the charges made against him in the Indictment have been substantiated."[8] Our perplexity is obvious; shall we content ourselves with meeting the case framed and upon mature consideration limited by the prosecution and thereafter answered by evidence from the defense? Or must we meet the summations as well? Our conclusion is that, while we believe the issues to have been sharply delimited, we have no right to risk the defendant's life or liberty on the correctness of our belief. We must meet the evidence and the summations. We must meet the evidence, the summations and the innuendo.

4. Regrettably, this example of irresponsibility given us by the prosecution is not exceptional, but is typical of their conduct of the case against this defendant. Of the ethics of prosecution in other lands I know nothing; but I know that this

8. Id., WW-45 (Tr. 41950).

case has been presented in a way which in my country would have called down upon those responsible the condemnation of any court in which it had occurred as being in flagrant disregard of the prosecutor's duty to act as an impartial officer of the court, to be scrupulous in fairness to the defendant who has no other protection than such as is afforded by the fact of just public officials. In a cause of the magnitude of this we are amazed to find the final summations treated in police-court style, breathing the spirit of gross partisanship, evidencing the fixed determination to secure conviction at all costs, at the cost whether of one-sided, distorted and misleading presentation of the evidence, or of creating inferences and hypotheses, in the absence of evidence, out of the whole cloth of ipse dixit. Justice is nothing, conviction is the shining goal of this prosecution.

Our position is one which may well seem novel or "brazen" to a prosecution which have not hesitated to assert before the Tribunal that the questions of whether the events charged in the Indictment constitute aggression, "crimes against peace," have already been conclusively decided by political action of the prosecuting nations, with only the

respective "shares of guilt" of the defendants remaining to be assessed by the Tribunal.[8a] To such a prosecution will appear novel our position that a man is just possibly not to be found guilty on the mere showing that the prosecution have charged him, and repeat often enough their conclusion of his guilt. The Tribunal will find the case against the defendant TOGO to be rested to an altogether remarkable extent on such ipse dixit. Nor are the reasons far to seek. This case is unique in more ways than one. On the one hand, there is very little evidence against this defendant. The evidence relating to him is largely free from conflict, only one or two points of consequence having given rise to dispute. These facts give rise, on the other hand, to an extraordinary number of points of law of more or less intricacy. In this state of the record, such case as the prosecution have against the defendant TOGO must rest on the inferences to be drawn from his actions, and on the application of principles of law to the factual situations disclosed by the evidence. The prosecution, perhaps not believing their case to lend itself to treatment on that basis, have not chosen to present it in that way; instead, it is

8a. E.g., Tr. 23566-68, 22974.

evident that a deliberate, calculated and transparent effort has been made to supply the want of substance in the case by insinuation, by innuendo and by other efforts to create prejudice. This is strong language--and I shall use more before I have done; after I shall have done the Tribunal will be able to judge whether it is justified. So let it be said quite plainly: we propose to demonstrate in instance after instance in the course of this argument distortions of the evidence, assertions of fact unfounded in any evidence, disingenuous efforts to ignore the evidence, so numerous and yet so consistent that they cannot have been the result of mistake or inadvertence, but must represent a considered plan to prejudice the Tribunal against the cause of this defendant. Such an effort will be futile, once it is recognized for what it is; the requirement of fair play for my client compels me to expose it, to do what I can to dispel this miasma of bias and prejudice and let the issues as raised by the actual evidence stand forth in plain view. That I am determined to do at whatever cost of time and effort.

One other thing I propose to attempt. In my view the case of this defendant can be submitted on the assumption that the principles of liability

laid down by the prosecution are correct. (I refer to the principles set out in the general summations on the subject, not to those incidental, by-blow doctrines casually tossed off in the individual summations without regard for logic or for consistency with the general summations or with themselves.) By the tests proposed by the prosecution themselves, I shall submit, this defendant must be adjudged not guilty.

5. As a starting point, let me analyze somewhat further the prosecution's abandonment of charges against the defendant TOGO. This act of theirs is passed over in silence by the prosecution in summing up, but it is one with a radical significance to the case nevertheless, a significance which the prosecution cannot obscure or diminish by the treatment which they choose to give it or to withhold from it. The significance of that abandonment by the prosecution of such a large part of the charges against this defendant is, it is submitted, clear. Having decided to charge Mr. TOGO for acts performed as Foreign Minister of the TOJO Cabinet which they wished to declare criminal, the prosecution then delved into his past and, in order to lend a specious sort of plausibility to the character which

they wish to give him as a criminal and an enemy of society, added to the charges so leveled numerous others of improper conduct in the past -- during his service as Secretary to the Embassy in Germany, as secretary-general of the delegation to the General Disarmament Conference, as Director of the Foreign Ministry European-Asiatic Bureau, as Ambassador to Germany and to the USSR. To support these charges they put into evidence numerous documents, selected seemingly at random, bearing his signature or seal or not, recording his utterances, or mentioning him. Then, when at the conclusion of the prosecution's case the defense moved dismissal of the counts relating to those earlier periods, pointing out the failure of evidence in connection with them, they were vigorously supported by argument including specious misstatements of the record and of fact.[9] When thereafter, the defendant having made ready to present a defense including the issues so framed by the prosecution on these charges determined by the Tribunal to have been prima facie established, the Chief Prosecutor himself announced in open court that the prosecution would not press any of the charges relating to the time prior to October 1941, his action

9. E.g., Tr. 16939, 16942-43, 16944.

could have but one meaning. By that abandonment of their charges--and, if that were not enough, by failure to cross-examine any of the witnesses produced to testify to the events of those years--the prosecution confessed openly that, having employed the combined r sources of the eleven great powers whom they represent to search the world for evidence against the man, they could find nothing. It is interesting to speculate how many statesmen of any nation could survive the test--his entire career, public and private, subjected to a scrutiny such as there can never before have been opportunity for making; the entire remaining archives of his government, and the archives of every other government, friendly or enemy, available for ransacking by the prosecution, the very realization of a prosecutor's dream; every enemy whom he has ever made officially or personally encouraged to come forward to win acclaim by the giving of testimony against a man now held up to revilement as a war criminal, an enemy of the human species; the evil construction to be put upon his every word or deed susceptible of alternative meanings. How many statesmen could come through this inquisition unblemished in reputation? I repeat, against this defendant TOGO Shigenori the prosecution

found, and confessed that they had found, nothing.

6. Now, in summation, they return to the charge. Now they spin their fine web of argument designed to induce the Tribunal to believe this defendant to have been engaged in nefarious activities throughout the long years to which the Indictment relates. If this prosecution is an honest one, we can expect of them a candid answer: Did they "believe that it is our duty," as the Chief Prosecutor said that he believed, to state to the Tribunal that their abandonment of the charges represented "our concept of the guilt of TOGO or the lack of guilt"?[10] If they believed that in December, with what logic can they in March submit "that the charges made against him in the Indictment have been substantiated"?[11] Nothing has occurred in the interim to affect their belief; they cross-examined no witnesses, including the defendant, on their testimony to those matters; in rebuttal nothing was offered by them[12] relating to those charges or that period. The prosecution cannot have believed in December in Mr. TOGO's lack of guilt of charges which they abandoned, and in March believe on the same evidence that he has been proved guilty

10. Tr. 35352.
11. Summation, WW-45 (Tr. 41950).
12. Tr. 38065-80.

of them. By no explanation can it be concealed. They do not believe him guilty; they do not believe him to have been proved guilty of those charges. Then why do they argue them so long and so ingeniously? Let them deny it if they can that the purpose and the sole purpose is to create prejudice against this defendant, that and nothing more. This, I say, is an irresponsible prosecution.

7. Here reference to a specific, concrete example of the prosecution's methods will be useful. As was mentioned above, the prosecution reserved from their confession of failure against Mr. TOGO one point, which I state in their words: "The reservation above referred to pertains to his conduct as Ambassador to the USSR in 1939 and whatever criminal conduct may be found to exist by virtue there in reference to the Nomonhan Incident."[13] In the evidence is nothing to show any "criminal conduct" of this defendant in relation to the Nomonhan Incident--the whole of the evidence is that it was by his initiative and efforts that the incident was settled;[14] in summation no mention is made of any such responsibility of his. Here is how the Nomonhan question is treated, as it

13. Tr. 35347. An additional reservation was not of a claim of liability of the defendant.
14. Infra, Section 24.

relates to Mr. TOGO, in the summation. In the general summation on Nomonhan[15] his name is not mentioned, except as signatory of the TOGO-Molotov Agreement which as its sequel settled boundaries. The word "Nomonhan" does not appear in the summation against him individually; but in its last paragraph are listed, among the counts which charge him, Counts 26, 36 and 51, alleging, as offenses growing out of the Nomonhan Incident, the initiation of war of aggression, the waging of war of aggression, and murder. That paragraph refers, for the discussion of liability on those counts, to paragraph 9 of the summation.[16] I take the liberty of quoting to the Tribunal the entirety of that paragraph 9 which constitutes the prosecution's considered judgment of what the record justifies as argument against the defendant TOGO in this connection: "The accused was appointed Ambassador to the Soviet Union on 15 October 1938 and arrived in Moscow to take up his new position on the 27th of the same month."[17]

15. Summation, H-109--H-124 (Tr. 39854-75).
16. Id., WW-45 (Tr. 41951).
17. Id., WW-9 (Tr. 41884). The section following continues directly with the matter of his recall, at the end of his service in Moscow, in August 1940.

That is the whole of the argument of his liability in connection with the capital charges based on the Nomonhan Incident.

The net result of these circumstances, it is submitted, is that the prosecution have by their conduct but made common cause with their own witnesses and those of the defense in giving to Mr. TOGO a character as precisely the opposite of that which they now seek to maintain to be his, but seek to maintain by their bare assertion alone. It was admitted when these charges were abandoned -- and it is not now seriously pretended otherwise -- that throughout his career prior to 1941 he had been in opposition to those who preached and practiced extremism, militarism, chauvinism. It was then admitted that this defendant was a man of character, of honor and of honesty, of veracity; the prosecution themselves do not even now seriously challenge his veracity or credibility, but on the contrary rely on his testimony, when it conflicts with that of the few other defendants who -- in every instance disastrously for themselves -- ventured to dispute it. Instances are numerous in which in their summations the prosecution phrase their submissions and conclusions in the very words of the testimony of this defendant, adopting his statements and explanations as their own.

8. Let me summarize what we submit to be the

inescapable conclusions to be drawn from this action of the prosecution, and their significance to the Tribunal; they need not be argued again, but may be held in memory when we come to consider the evidence in the case. The prosecution, then, charged this defendant with a variety of crimes, and put in what evidence they could find to sustain the charges. Having done so, and after the defense case had been prepared and served on the prosecution, they abandoned a substantial part of those charges, confessing thereby that there was no evidence of criminality of any act or thought of the man. The defendant, in answer, produced the testimony of a considerable number of witnesses -- the large majority of whom were not cross-examined by the prosecution -- and of himself, who on the witness stand was argued with for more than four days, but was subjected to nothing properly describable as cross-examination to credit. In rebuttal nothing was offered tending to disprove anything which had been testified to by him or his witnesses. In these circumstances, it is submitted, it cannot be contended that the conspiracy charges prior to 1941 against him have any relevance; the charges of substantive crime against him prior to

18

18. Tr. 35,348

1941 must be considered to have failed; and the prosecution have in effect placed the cachet of their approval on his credibility. If they wish him to be convicted, it must be for his acts in connection with the Pacific war only, and even there must be on the basis of his testimony taken as admitted.

9. Another extraordinary circumstance which must be mentioned as background for discussion in detail of the evidence in the TOGO case is the fact that this defendant, alone of the men here on trial had once committed to writing a complete formulation of his views on international relations and the policies which he advocated. This document was written in 1933, and a copy of it by good fortune preserved was introduced into evidence to form the foundation of the defense of Mr. TOGO.[19] Having this document in its hands, the Tribunal is enabled to know indisputably, without resort to inference, surmise or deduction, this defendant's true intentions at one period of his life, at any rate. The Tribunal is urged most strongly to read the entirety of this document. The prosecution have offered a variety of depreciatory comments concerning it --

19. Exhibit 3609-A (Tr. 35,362).

10. The significance of this document cannot be doubted. Prepared fifteen years ago, which long before a trial or a defense was ever ...ed of, it was not for publication, not for ...aganda use, not a theoretical treatise on the ...l. It was on the contrary a "Most Secret" ...ial document; it was prepared under order of ...iter's superiors for the confidential infor... of the Foreign Ministry, with the aim of

the Govern-
of these cir-
cumstances, that it recognized no compulsion to dissimulate or euphemize, but was from that viewpoint the completely candid expression of the author's true intentions. On the other hand, this document was, as has been mentioned, not an elementary text of the theory of diplomacy, for use of students, but was designed to induce action by the author's superiors, and their superiors, the Government. It had, as such, to take account of the national policy as already charted, of the circumstances of the time; the author, faced with conditions, not with theories, had to make the adaptation of his policies to what was practically possible. Had the author been writing of an ideal, he would no doubt have written differently; but he was not, which is precisely what gives this document its transcendant value to the Tribunal. For even in those circumstances -- even at a time, to be specific, when the national policy of establishment of Manchukuo and abandonment of the League of Nations had been decided irrevocably, all of which the author of a suggested policy had to take into account if he had any expectation whatever of its

all of which we shall take up in due course -- and by quotation of isolated phrases and sentences from it have attempted in their all-too-familiar way to distort its significance; but again I say, let it but be read as a whole. It is, of course, impossible for me, much as I might wish it, to recite the whole of it to the Tribunal -- though I shall before having done read considerable excerpts from it -- but I repeat that there is nothing in this document which we fear, nothing which, read in its context, is damaging or unfavorable to the defendant TOGO; that there is not only nothing in it inconsistent with that peaceful and honorable character which the whole evidence shows to have been his throughout life, but on the contrary the whole spirit of the document bears out this estimate of him.

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basing the action of the Ministry and the Government; and it can be supposed, in view of these circumstances, that it recognized no compulsion to dissimulate or euphemize, but was from that viewpoint the completely candid expression of the author's true intentions. On the other hand, this document was, as has been mentioned, not an elementary text of the theory of diplomacy, for use of students, but was designed to induce action by the author's superiors, and their superiors, the Government. It had, as such, to take account of the national policy as already charted, of the circumstances of the time; the author, faced with conditions, not with theories, had to make the adaptation of his policies to what was practically possible. Had the author been writing of an ideal, he would no doubt have written differently; but he was not, which is precisely what gives this document its transcendant value to the Tribunal. For even in those circumstances -- even at a time, to be specific, when the national policy of establishment of Manchukuo and abandonment of the League of Nations had been decided irrevocably, all of which the author of a suggested policy had to take into account if he had any expectation whatever of its

eventual adoption -- even in such circumstances, nothing can be found in this document which tends to suggest an aggressive or unpeaceful outlook of the author. The prosecution objected to this document, when it was tendered, as irrelevant and as having no probative value.[20] The correctness of the argument of its relevance[21] -- affirmed by the Tribunal in admitting the document into evidence over objection -- has not been challenged in summation. Rather, the prosecution concede its unique relevance by devoting to it several pages of their summation in the endeavor to torture from it some expression or suggestion of aggressive intent. We will agree to the importance of the question as proved by this concern of the prosecution with it; but shall show that when read as written the document not only will bear no such interpretation as the prosecution seek to impose upon it, but completely and conclusively establishes the attachment to the contrary principles which has motivated the defendant's official conduct throughout his career. The final proof of this, as I have mentioned, is in the reading of the document as an entity, as it was written.

20. Tr. 35,350-52
21. Tr. 35,353-57

11. The document will be reverted to in connection with the several branches of the case -- Russian relations, America, China and others -- but now as a preliminary I wish to analyze it in a general way. To raise the issue sharply, let me state again, and in this way, the contention. Japan was in 1933 committed to a certain course of policy -- she had withdrawn from the League of Nations and had, as the prosecution mention, incurred the condemnation of the members of the League and of other nations[22] by her conduct in the Manchurian Affair. Any junior official drawing a proposed policy for Foreign Ministry and Government had to take that condition into account; he would be a fool to propose a course in defiance of the national policy as already established. But it is ventured that even in those circumstances, the policy stated in this document is such that had it been adopted and followed, there would have been no China Affair and no Pacific war. By the prosecution's analysis, Bureau Director TOGO in this document, while advocating a policy of "temporary peace" and "measures of ap-

22. Their "by all other civilized nations" seems to take little account of one largely interested party, the Soviet Union, which never condemned. Summation, SWW-4 (Tr. 41,871)

peasement" to the other Powers, in sum "put himself squarely behind the Japanese policy of aggression."[23] Our analysis is utterly and diametrically different.

12. The document breathes throughout the one indispensible necessity, of restoring international confidence in Japan -- confidence which, as is bluntly pointed out, had been much damaged by the Manchurian Incident.

"Since the Manchurian Incident, various European and American countries have charged Japan with having practically ignored her treaty obligations and embarked on aggressive action. It is an undeniable fact that these countries are apprehensive lest Japan should engage in such actions whenever an opportunity is afforded. As a result, Japan has, since the year before last, as much lost international confidence as she has enhanced her military prestige. In modern international society resort to force is a matter of the utmost seriousness, especially among the great Powers, and every possible effort should be made to avoid it. There are not a few instances in history of the unjustifiable use of armed force resulting in failure.

23. Summation, SWW-4, (Tr. 41,873)

. . . Respect for truthfulness should be alike among nations as among individuals, for it is manifest that when a nation forfeits international confidence it is ultimately the loser."[24]

It is of interest, just by the way, to note that, apparently in the effort to impress upon the policy-makers the seriousness of this "forfeiture of international confidence," unusual emphasis is placed in this document on the criticisms of Japan by foreign countries.[25]

As the policy to be adopted by Japan in place of that which had brought her to the point of such low international esteem, the author of this document urges adherence to certain basic principles, together with concrete proposals to put them into effect. Among his statements of general principles are that "any idea of trying to monopolize the Pacific is unrealistic"[26]; that the use of force to obtain others' property is "unjustifiable"[27] and that every possible effort should be made to avoid it;[28] that Japanese good faith should be "proved" to the world.[29] Japan, he urges, should make it clear

24. Exhibit 3609-A, pp. 24-25 (Tr. 35,372-3)
25. Id., pp 1-2, 4, 8. 11, 14-15, 24-25
26. Id., p. 3 (Tr. 35,475)
27. Id., pp. 24-25 (Tr. 35,371-2)
28. Id., p. 25 (Tr. 35,372)
29. Ibid.

that, even with the Manchurian Affair regarded as a fait accompli, she "entertains no territorial or political ambitions in any other area,"[30] nor in Manchukuo itself was there to be Japanese monopoly;[31] friendly, normal relations should be established with the United States,[32] Great Britain[33] and the USSR.[34] "It is highly advisable," he says, "that our Government . . . declare to the world our sincere desire and intention of maintaining peace in the Pacific, of keeping it always quiet and true to its name."[35]

May I emphasize? Not that Japan should feign, while dissimulating, the intention of trying to monopolize the Pacific, but that such an intention is unrealistic; not that Japan should cling to while disclaiming the intention to resort to force but that every possible effort should be made to avoid resort to force; not that other nations should be induced to believe in a fictitious Japanese good faith, but that good faith should be proved. That Japan declare her sincere desire to maintain peace in the Pacific.

30. Id., p. 4 (Tr. 35,476) 31. Ibid.
32. Id., pp. 4-5 (Tr. 35,477)
33. Id., pp. 5, 8, 27 (Tr. 35,478-84)
34. Id., pp. 17-19, 23-24, 25-26 (Tr. 35,365-8, 35,370-72, 35,373)
35. Id., p. 15 (Tr. 35,481)

13. The document is eloquent of the author's intention that his Government should be persuaded to make the Manchurian Incident the last such event of her history. The place of Manchukuo itself as an accomplished fact and part of the national policy is accepted; Japan must "pursue her Manchurian policy," he says, because it has been so decided, but the Manchurian Incident itself is nowhere defended, but is inferentially condemned, throughout. The clear warning is sounded that such a course must be abandoned:

"Since the Manchurian Incident, various European and American countries have charged Japan with having practically ignored her treaty obligations and embarked on aggressive action. It is an undeniable fact that those countries are apprehensive lest Japan should engage in such actions whenever an opportunity is afforded . . . We should not repeat acquisition in violation of principle, then in reliance on the principle insist upon retention of the gains."[36]

Every suggestion contained in this policy is the opposite of that of attempting to extend Japanese dominion over east Asia:

36. Exhibit 3609-A, pp. 24-25 (Tr. 35,372).

"As the United States does not desire the exercise by Japan of absolute superiority over the entire Far East, Japan should not, on her own part, make this her actual policy in the foreseeable future."[37]

Policy toward China is to be peaceful:

"As regards China, . . . we should, if any opportunity offers itself, immediately lay down our policy for the speedy restoration of good will, and strictly abide by it and prove our good faith to the world."[38]

Other Powers are not to be excluded:

"In China Proper, we should cooperate in the development of that country with other Powers, especially the United States and Great Britain. . . . The interests of (the United States) and Japan could be adjusted if the principle of the Open Door and equal opportunity were realized in the Far East."[39][40]

Nor is Manchukuo to be made a Japanese preserve:

". . . it is essential that the foundations of a really independent Manchukuo be established, and that she be led to observe as much as possible

37. Id., p. 26 (Tr. 35,483)
38. Id., p. 25 (Tr. 35,572-3)
39. Id., p. 26 (Tr. 35,483)
40. Ibid.

the principle of the Open Door and equal opportunity, and that it be made clear that Japan entertains no territorial or political ambitions in any other area except Manchukuo."[41]

There is in the document no breath of a suggestion that further aggression should be undertaken from Manchuria; rather, the repeated insistence is that "every possible effort should be made to avoid" resort to force, is upon rejecting as Japan's "actual" policy any attempt to secure domination over the Far East, upon demonstrating to the world a "sincere" desire for maintenance of peace.

14. The prosecution are able to discover in this document the intention that a policy of "appeasement" should be followed while Japan prepared for engaging in further conquests.[42] Is it consistent with the idea of appeasement that Mr. TOGO urges the conclusion with the USSR of a non-aggression pact,[43] the settlement with her of all issues likely to be sources of trouble,[44] and that "we should by all means avoid any clash with the Soviet Union"?[45] Is it consistent with the idea of

41. Id., p. 4 (Tr. 35,476)
42. Summation, SWW-4 (Tr. 41,872)
43. Exhibit 3609-A, p. 23 (Tr. 35,370)
44. Id., pp. 23-24 (Tr. 35,370-72)
45. Id., p. 25 (Tr. 35,373)

toward China. Strange "appeasement," this committing of Japan to the permanent courses of a peaceful policy, disarming her, bringing her into such good relations with all potential enemies that there can remain no friction! Strange appeasement, indeed, a policy the principal aim of which is the restoration of deserved international confidence! The prosecution conclude that "the policy as recommended here, although advocating temporary peace, would obviously fit the purposes of the most strenuous advocates of aggression."[52] Obviously; in precisely the sense that the Ten Commandments would fit the purposes of the most immoral advocate of sin.

THE DEFENSE EVIDENCE

15. The prosecution like to dwell on what they allege to be the fact that the evidence on behalf of the defendant was largely oral, and was the testimony of "the accused's immediate subordinates, colleagues or superiors during the period of time covered by the Indictment."[53] This suggests several reflections. If the remark were true it would be wholly immaterial in so far as concerns any tendency to detract from, minimize or impeach the evidence

52. Summation, SWW-4 (Tr. 41,874)
53. Summation, SWW-2 (Tr. 41,868-9)

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appeasement that he recommends conclusion with the United States of treaties of arbitration and mediation,[46] Japanese guarantee of the neutrality of the Philippines,[47] and that "the basis of our policy toward the United States should be to avoid war"?[48] That he proposes the cultivation of an atmosphere conducive to Anglo-Japanese cooperation,[49] and says that "promotion of friendly relations and collaboration between Great Britain and Japan is highly essential"?[50] Is it consistent with the intention of appeasement that he urges, in anticipation of the 1935 naval disarmament conference that Japan must make every effort to "reconsider our own disarmament policy"[51] -- to agree to American and British desires for disarmament? This "appeasement" is the buying off of opposition to gain time for preparing an offensive, by throwing some sop to allay suspicions; it has no relationship to such policies of permanent, not temporary, measures as those of disarming, entering into treaties, of non-aggression, arbitration and mediation, of promoting the Open Door and equality of opportunity in China, cooperation with Britain and the United States, and a fair and moderate policy

46. Id., p. 27 (Tr. 35,484).
47. Id., p. 4 (Tr. 35,477)
48. Id., p. 8 (Tr. 35,476)
49. Id. p.8 (Tr. 35,479)
50. Id., p. 27
51. Id. p.27 (Tr. 35,491)

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53. Summation, SWW-2 (Tr. 41,868-9)

so given. It is but natural that the evidence best calculated to explain the official acts and motives of a professional diplomat will be given by fellow-diplomats, his immediate subordinates, colleagues or superiors; by those men with whom he worked, and who best know him and his acts; not by strangers to his acquaintance, by physicians, actors or priests. Just so can the acts of a soldier, and their significance, be expected to be best known to his companions-in-arms, or of a lawyer to others of that calling. The prosecution's statement is, however, not true; characteristically, they have ignored both in these sweeping generalizations and in their analysis of the evidence the testimony given on behalf of Mr. TOGO by two former premiers of Japan -- Admirals OKADA[54] and SUZUKI,[55] the former the prosecution's own witness of whom the chief prosecutor made in open court the voluntary statement that "the prosecution have great respect and confidence in" him;[56] by the prosecution's own "star" witness, the ubiquitous General TANAKA Ryukichi;[57] of the prosecution's own important and highly-respected witness General UGAKI Kazushige;[58] and of other prosecution witnesses.

54. Tr. 37,163
55. Tr. 35,590
56. Tr. 29,301
57. Tr. 35,540
58. Tr. 34,908

They have ignored the testimony given on behalf of this defendant by such other diverse and disinterested witnesses as the prosecution's witness General KASAHARA Yukio,[61] Vice-Chief of the Army General Staff TANABE Moritake,[62] one-time Chief Cabinet Secretary SAKOMIZU Hisatsune,[63] Chief Secretary to the Lord Privy Seal MATSUDAIRA Yasumasa,[64] all men of unblemished reputation and not the former subordinates, colleagues or superiors of this defendant. In not one of these instances, moreover, did the prosecution see fit to cross-examine. Whether they wish to cross-examine is their concern; but whether by failure either to do so or to introduce conter-vailing evidence they do not concede the truth of testimony is, as was pointedly and repeatedly made clear to them by the President of the Tribunal,[65] the Tribunal's concern. The prosecution may ignore this evidence as much as pleases them; but they cannot escape the consequence, which is that in law or in common sense that which is ignored must, if it be not on its face incredible or in conflict with other evidence, be taken as true. So of the testimony of these witnesses.

59. Tr. 1220
60. Tr. 35,484
61. Tr. 35,428
62. Tr. 35,567
63. Tr. 35,603
64. Tr. 35,595
65. Tr. 26,217-26

Whalen

16. A few words further about these witnesses whose existence the prosecution wish conveniently to forget. Half a dozen or more of them occupy yet responsible positions in the various branches of the Japanese Government,[66] one being Minister of Communications in the present government;[67] others are mayors of municipalities;[68] another is a prominent member of the House of Councillors of the national Diet.[69] Men of this type do not stand in the witness box to lie on behalf of their former colleagues or superiors; personal friendship may well be a matter to be taken into account in estimating the weight to be allowed to their evidence, but little question arises of the weight of testimony which has at all times gone unchallenged by the prosecution. As one of these men said, when asked (by another defense counsel) whether he was not happy to testify to anything which would be of help to his former superior, "so long as it accords with the facts I should be glad to do so according to justice."[70] Nor is their testimony to be underestimated

66. NARITA, Katsushiro (T. 35,388), YUKI, Shiroji (T. 26,207), NISHIMURA, Kumao (T. 23,562), INOUE, Kojiro (T. 35,493), KADOWAKI, Suemitsu (T. 35,517), and HOGEN, Shinsaku (T. 38,837).
67. TOMIYOSHI, Eiji (T. 35,522).
68. OTA, Saburo (T. 35, 585) and KAMEYAMA, Kazuji (T. 35,417).
69. SATO, Naotake (T. 35,547).
70. Testimony of INOUE (T. 35,504).

because of this friendship or esteem for the defendant; rather, the esteem of such men is itself evidentiary for him. It is important and proper to prove in this way not only the circumstances and manner of his transaction of the affairs to which they testify, but as well the state of mind with which he did those things.

Moreover, while it is true that Mr. TOGO relied for his defense largely on the testimony of witnesses, it will hardly be forgot that a considerable number of documents concerning the Japanese-American negotiations as conducted by him was introduced also. The defendants are under the obvious disadvantage that the most of the archives of the Japanese Government were destroyed by bombings or by fire during the war, and that most of the rest, having been seized by the occupation forces, are in possession of the prosecution, have been sent to Washington, whence they have not been obtainable, or have been "lost"; it is thus only by chance that any such documents can be obtained by the defense, who must therefore rely largely on the testimony of witnesses.

17. Lastly, on this subject of the evidence of the defense, it should be remarked that the prosecution's wonderment at the defendant's introduction of evidence "aimed at explaining the motives for many of

his actions" is astounding. Here is the best proof of how far this prosecution has strayed from those principles which should animate any criminal prosecution, that they seem entirely to deny the necessity of their establishing the mens rea of the defendants. Have they forgot that intent is an element of the crime of murder? Have they forgot that intent is an element of the Anglo-American crime of conspiracy, which they would transplant into the law of nations? Do they not remember that the intent with which war is waged differentiates the agressive from the defensive? This--it cannot be emphasized too strongly--is the rot at the root which vitiates the prosecution's entire argument: they like to repeat that such defense evidence proves only ("if that") that the defendant "did not at all times actively participate in furthering the conspiracy either because his official position, or lack of position, did not enable him to do so or because he temporarily disagreed with" actions being taken.[71] If we venture to add "or because he permanently and fundamentally disagreed with that course", the only answer which we can glean from the summations is the question-begging one, "Oh! no; he is by our hypothesis a bad man, he couldn't really have disagreed in principle." If it

71. Summation, SWW-2 (T. 41,869-70).

sounds childish, so stated, it is not my argument, it is the prosecution's. But we shall discuss the prosecution's "conspiracy" somewhat later. What this evidence of the defendant TOGO's intent and opinions in the years prior to 1941 tends to prove is his intent in 1941 and subsequent years. It is a well-known principle in law and obvious in fact that if proof of a man's criminal intent in 1941 may be made by showing his own statements in 1940 or in 1942--or in 1931 or 1951--so may his lack of criminal intent be shown by the same proof. The statements antecedent to 1941 are naturally of more probative value, having been made at a time when normally there could be no motive for the making of a false statement. Just as the existence in 1933 of a formulated design of this defendant to commit aggression against the world at large when and where he could would be of patent probative value on the question of the intent with which in 1941 he performed the acts for which he is charged, just so is his entertaining in 1933 of the considered view that aggression should never, in any circumstances, be undertaken probative of the intention with which he performed these acts of 1941. That the mere lapse of time in such case does not impair the probative value of such evidence we can state on eminent authority:

"The length of the allowable interval depends on whether, under the circumstances of the case, there is any real probability that the continuation of the condition was interrupted,"[72]

says Wigmore. That there is no such real probability here appears from the evidence that the design of working for peace expressed by Mr. TOGO in 1933 in his report to the Foreign Minister still existed in 1945, at the end of the period covered by the charges herein, when he entered the SUZUKI Cabinet on the express condition of being permitted to work for ending the war, and existed at all times intervening concerning which there is proof. For we do not propose to demonstrate that Mr. TOGO committed no crime, performed no reprehensible act, and kept his skirts clear when such actions were afoot; we propose to demonstrate that throughout his career he has acted affirmatively to prevent, where possible, the performance of such acts. It is not his defense that he was static or passive in the presence of crime, but that he has been a force acting to prevent the commission of crime.

We turn now to consideration of the evidence relating to the various charges. Thinking that it may be a convenience to the Tribunal, we shall take up the

72. Wigmore, Evidence (1940), §233, ii, 38.

various questions so far as it is practicable in the order in which they are dealt with in Mr. TOGO's own affidavit (which also was roughly the order of presentation of the remainder of his case).

SOVIET AFFAIRS

18. Mr. TOGO having throughout his diplomatic career been by chance or otherwise more or less of a Russian specialist,[73] it is interesting to note that there is no evidence whatever against him of commission of any offense or even unfriendly act against the U.S.S.R. The charges which are made against him in connection with the Nomonhan Incident have been mentioned above,[74] together with the "discussion of the evidence relating to" them. What remain are the various charges of planning and preparing aggressive war against the U.S.S.R. from 1928 to 1945. These are supported by no evidence; to them is applicable the prosecution's concession that Mr. TOGO participated in no conspiracy during the years that he was connected directly with affairs of the U.S.S.R. We do, however, find in the little anthology of invective and abuse which constitutes the peroration of the summation of the Soviet case this passage--a passage without citation of evidence, framed without reference to any matters mentioned in that summation

73. Testimony of TOGO (T. 35,628).

74. Supra, § 7.

theretofore, intemperate, supported by no evidence and false in fact:

"Working in the field of diplomacy, TOGO always carried on intense hostile activities against the U.S.S.R., not stopping at the heaviest crimes. As Foreign Minister from October 1941 through September 1942 TOGO,[75] together with TOJO, should bear responsibility for the preparation of a war of aggression against the U.S.S.R. The active role played by TOGO in that matter is emphasized by the fact that during that period he was a member of the Kokusaku Kenkyu-Kai and generously subsidized this society which was engaged in the drafting of plans of aggression against the Soviet Union . . . .[76]

This may prove that the Soviet Union cherishes a vindictive hate for statesmen who have served as ambassador in her capital, have been received there as friends of the Soviet Union and feted by her Foreign Minister in flattering terms; but for the purposes of this case it proves also, and only, by the total failure of a pretense of attempt to support it, that the Soviet counts of the Indictment are without foundation in

75. This is erroneous. He resigned his office on 1 September; see Ex. 127 (T. 791).
76. Summation, SH-203 (T. 39,973-74).

fact or in law, that they should never have been published to the Tribunal, and that the admission of their baseless character which the prosecution once made, and now in common good faith should stand by, was fully justified.

19. We do not, however, propose to rest on the absence of proof to support these charges which to this day the prosecution are pressing--are again pressing. Far from doing so, we propose to show for the strong proof which it gives of his peaceful and law-abiding nature the affirmative facts of Mr. TOGO's life-long policy of peace and good-will toward the Soviet Union.

We start with the 1933 document, "On the Foreign Policy of Japan vis-a-vis Europe and America Following Withdrawal from the League of Nations." 77 Mr. TOGO's contact with Soviet affairs prior to 1933 had been confined, as appears from the evidence, to service as section chief in the European-American Bureau of the Foreign Ministry from 1923 to 1925, at the time when Japanese-Soviet relations, ruptured since the Red Revolution, were being restored. His efforts, primarily (his being the section directly concerned), resulted in the Soviet-Japanese Basic Convention, signed

77. Ex. 3609-A (T. 35,362).

in Peking in 1925, re-establishing relations on a nor-
mal footing.[78] The first connection which Mr. TOGO had
with Soviet affairs during the period here under scru-
tiny was, however, when in early March 1933 he assumed
the office of Director of the European-American (later
European-Asiatic) Bureau[79] of the Foreign Ministry. Here
his first task was the preparation, at the order of
the Foreign Minister, of the document above referred
to, over a third of which is devoted to the question
of Soviet-Japanese relations.[80] What has been said be-
fore regarding the circumstances of its composition
must be emphasized: the national policy, of support
of Manchukuo and withdrawal from the League, had been
established, and with it Mr. TOGO had nothing to do,
he had perforce to accept it as he found it and to ac-
commodate his proposed policies to it. It would have
been neither statesmanlike nor beneficial to the cause
of peace, but imbecilic, to propose policy, however
idealistic, which failed to take account of the faits
accomplis; what the sincere lover of peace must do is,
if he is a practical statesman, not to attempt the
impossible but, working from conditions as he finds
them, to try to change them for the better where they

78. Testimony of TOGO (T. 35,628).
79. Exs. 127 (T. 791) and 3612 (T. 35,385); testimony of TOGO (T. 35,629).
80. Testimony of TOGO (T. 35,629).

can be changed.

20. Now for the proposed foreign policy of Mr. TOGO vis-a-vis the U.S.S.R. It commences with a review of relations between the two countries from the resumption of diplomatic relations and the reasons necessitating their adjustment,[81] making the point that improvement of relations would neither affect injuriously Japan's relations with America and Britain nor aggravate her domestic problem of Communism.[82] The analysis of the problem is followed by the conclusion that "therefore it is by all means advisable that we make earnest efforts to improve our relations with the Soviet Union", and "a concrete program for the improvement of Japanese-Soviet relations."[83] The author points out that "of all the concrete measures for the improvement of" relations, "that most desired by the Soviet Union is a non-aggression pact", and discusses at length the pros and cons of such a pact as they were then being debated in Japan.[84] That they should have been discussed, here, at all may strike one as rather remarkable evidence of determination to work for good relations, in view of the fact that it had been only a matter of weeks before that the same foreign minister

81. Ex. 3609-A, pp. 15-17.
82. Id., pp. 18-19.
83. Id., p.20.
84. Id., pp. 20-23.

to whom Mr. TOGO was submitting his recommendations had declined the latest of the tentative Soviet suggestions of entering into such a pact.[85] The conclusion which Mr. TOGO arrived at was that "Inasmuch as it is our desire to improve and stabilize our relations with the Soviet Union, there is no reason why we should not meet this desire of the Soviet by the conclusion of a non-aggression pact. . . . there are no reasons why such a pact should not be concluded. It is recommended that the pact be concluded . . ."[86] Other recommendations were that economic problems between the two nations be solved by conclusion of a commercial treaty, if the domestic situation permitted, and settlement of issues over Japanese concessions in Northern Saghalien; that the problem of demarkation of the Soviet-Manchukuo border be solved, to prevent the threat to peaceful relations posed by the possibility of military border clashes; and that the Chinese Eastern Railway problem be solved by purchase of the Soviet interest therein.[87] These measures, thought the author, would accomplish the solution of all pending issues and sources of trouble between the Soviet Union, and Japan and Manchukuo.

85. Summation for the defense, Section "H", "The Soviet Case), §5 (T. 42,712-17).
86. Id., p. 23 (T. 35,370).
87. Id., pp. 23-24 (T. 35,370-72).

21. Two misquotations of this document by the prosecution must be mentioned. It is said to contain the statement or conclusion "that the Soviet Union was afraid of Japan and not Japan of the Soviet Union."[88] No such statement appears in the document. The author does say that "the Soviet attitude toward Japan has generally been conciliatory to the extent permitted by their internal situation"[89], that "the Soviet attitude toward Japan since the Manchurian Incident has been relatively moderate"[90], and that "at present" the Soviet Union "is making efforts to avoid conflict with us."[91] But he says also that "the strong concentration of power enabled Russia to pursue such a policy."[92] The other misquotation of the evidence is this. He is said to have written that

> "A conflict with the Soviet Union should be avoided unless Japan could make a common front with Great Britain and the United States. As it was clear, however, that the Soviet Union was making efforts to avoid such an occurrence Japan should, in case of war, stand alone and be condemned as an aggressor."[93]

88. Summation, SWW-4 (T. 41,873). Page 19 of the exhibit it cited.
89. Ex. 3609-A, p. 17.
90. Id., p. 20
91. Id., p. 25 (T. 35,373).
92. Id., p. 17.
93. Summation, SWW-4 (T. 41873-74).

We cannot be sure whether this is intentional, because the word supplied by the prosecution can be understood in two ways: the word "should" in the second sentence. What the author said, at any rate, was "would"--but let us see the entire section in his own words.

> "In case it should become inevitable for us to come to armed conflict with the Soviet, it is most desirable to make a common front with Britain and America. However, as it is clear that the Soviet is making efforts to avoid such an eventuality, other Powers would not support Japan but would rather condemn Japan as an aggressor. We should by all means avoid any clash with the Soviet Union."[94]

Other Powers would condemn Japan as an aggressor--wherefore Japan should not clash with the Soviet Union! This insistence that such a clash should be avoided is reiterated a dozen times in the document; Japan should "promote friendly relationships with other Powers",[95] should "make every effort in accordance with the general course of policy to promote friendly relations

94. Ex. 3609-A, p. 25 (T. 35,373, despite the prosecution's statement (loc. cit. supra n93) that it was "not read").
95. Id., p. 17 (T. 35,365).

with" the U.S.S.R.[96], should, "endeavoring to avoid unnecessary friction with Russia, establish the relations of a good neighbor with her"[97]; "improvement of Soviet-Japanese relations will have a beneficial influence on third Powers by proving our peaceful intentions, and thus contribute to the betterment of the relations with the United States, Great Britain and other countries"[98]; world opinion will become "bitter should a military clash occur between Japan and the Soviet Union. If such an eventuality ever occurs, our international relations will be much worse than at the time of the Manchurian Incident; and if it should be protracted international intervention would have to be expected. Japan should avoid making any issue with the Soviet Union at present"[99]; "It is by all means advisable that we make earnest efforts to improve our relations with the Soviet Union"[100]; "it is our desire to improve and stabilize our relations with the Soviet Union."[101]

THE PRESIDENT: We will adjourn until half past one.

(Whereupon, at 1200, a recess was taken.)

96. Ibid.
97. Id., p. 18 (T. 35,367).
98. Id., p. 19 (T. 35,368).
99. Id., p. 20.
100. Id., p. 20 (T. 35,369).
101. Id., p. 23

AFTERNOON SESSION

The Tribunal met, pursuant to recess, at 1330.

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: Page 35, section 22:

22. This, then, was Mr. TOGO's policy toward the Soviet Union, and it is submitted to be a peaceful, proper and laudable one, one which if published at the time to the Soviet Union instead of having been a "most secret" governmental document could have given that nation no cause for alarm or complaint. It remains to see whether these principles were adhered to in the author's actions of subsequent years. As he himself has pointed out, it chanced that his official positions of later years gave him opportunity to have considerable connection with Soviet affairs, hence to work for the fulfillment of his policy.[102] The first matter of business which he managed after becoming Director of the European-American Bureau was that of the sale of the Chinese Eastern Railway proposed by the Soviet Union.[103]

102. Testimony of TOGO (Tr. 35,630).
103. Id., (Tr. 35,630-32).

Concerning this business, of which Mr. TOGO was in charge as the responsible official, it is necessary to mention only one or two points. The prosecution now contend (though they do not mention Mr. TOGO in connection with the matter at all) that the sale was forced, or the purchase price driven down, by the mounting by the Japanese-Manchoukuoan side of numerous incidents on and along the railroad during the negotiations, with minatory intention.[104] The Tribunal is reminded, however, that these incidents along the right-of-way had been a feature of this anamolous situation -- the extraterritorial railroad -- for years. The Lytton Commission's report itself is authority for the facts that a long history of Russo-Chinese dissatisfaction over the condition, and conflicts and disputes in the railway zone, had culminated in 1929 in a full-scale military invasion of Manchuria by Soviet forces.[105] Such friction -- although it had decreased after the establishment of Manchoukuo (for there is no record of any such serious clashes after 1931) -- was but an inevitable consequence of the situation, of a road on territory of one nation owned and operated for its own benefit by another. Doubtless various disputes did

104. Summation, §H-83 (Tr. 39,817).
105. Exhibit 57 (Tr. 17,595-99).

occur during the Japanese-Soviet negotiations of 1933-35; they may even have increased in number. But while there is no pretence or charge that the diplomats of either nation had anything to do with their occurrence, there is clear evidence that Mr. TOGO took the initiative in trying to lead his own government to the peaceful solution which was eventually arrived at. It is of interest to note that in these negotiations Mr. TOGO had to deal practically with the exact situation which he had mentioned hypothetically in his proposed policy of April 1933: "In the last analysis," he had said then, "it is most desirable that the Soviet Union withdraw completely all its interests in the railway. However, since we cannot justifiably obtain Russian interests in the railway by forcible measures, it is only reasonable that we purchase their share in it. It is true that the cost is great, but other means such as force would raise the cost still higher inasmuch as it would mean the loss of international confidence by Japan and Manchoukuo."[106]

Of the truth of this he very soon had to convince his own government and military circles; no sooner had the sale of the railroad been proposed by the U.S.S.R. than it developed that "there was an opinion supported

106. Ex. 3609-A, p. 24.

by some of the military and other circles that it was useless to pay a high price for a railway which was sure to fall into the hands of Manchoukuo for nothing sooner or later. And it was feared that this might prove an obstacle to the purchase of the railway through peaceful negotiations. Mr. TOGO, in order to obtain the agreement of the cabinet to acceptance of the above Soviet proposal, and to make the government policy in this regard solid and stable, reasoned Mr. YAMAOKA, Juko, the then Director of the Bureau of Military Affairs of the War Ministry, and Mr. NAGATA, Tetsuzan, the then Director of the Second Department of the General Staff Office, into agreement to his opinion . . ."[107] said the chief witness on this matter (he was not cross-examined). The Soviet Union professed itself satisfied and pleased with the transaction after its consummation,[108] and an item of Mr. TOGO's program for adjustment of Soviet-Japanese relations had been realized by his efforts.

23. Opportunity for working at another of those items was promptly offered; for upon the conclusion of the Chinese Eastern transaction in the spring of 1935 the Soviet Government suggested its willingness to

107. Testimony of KAMEYAMA, Kazuji (Tr. 35,420); see also the testimony of MORISHIMA (Tr. 35,484).
108. Exhibits 3251 (Tr. 29,612) and 3252 (Tr. 29,616).

enter into negotiation for the establishment of a commission for prevention of Soviet-Manchoukuo boundary disputes.[109] These negotiations finally came to nothing, owing to some disagreement which could not be solved,[110] and the achievement of anything toward settlement of the border problem had to be postponed; but during the sixteen months of the negotiations Mr. TOGO worked for establishment of the border-demarkation commission as well as that for prevention of disputes.[111]

24. A last matter of Soviet-Japanese business managed by Mr. TOGO as bureau director was the settlement of the Kwan-tsa-tse incident of the summer of 1937, a rather trivial thing, because it was through his efforts stopped at the beginning, but one illustrating his invariable insistence on peaceful methods.[112] Leaving the European-Asiatic Bureau soon after for his new assignment in Germany, he had his next connection with Soviet affairs when he became Ambassador in Moscow in October 1938. During two years of his incumbency there a number of important problems arose, and opportunity was given for significant manifestations of his outlook and intent. These have been testified to by Mr. TOGO

109. Testimony of KAMEYAMA (Tr. 35,421) and TOGO (Tr. 35,633-34).
110. Ibid.
111. Testimony of TANAKA, Ryukichi (Tr. 35,540).
112. Testimony of TOGO (Tr. 35,635).

himself, in some detail; but in view of the prosecution's confession, by failure to cross-examine him or any of his witnesses concerning them or to discuss them in summation, that his conduct was above reproach, it will suffice to sketch them briefly here. The problem of the fisheries convention, which the new ambassador found awaiting him upon arrival in Moscow, was serious enough to threaten a rupture in diplomatic relations, but was finally settled, after negotiations extending over half a year, to the mutual satisfaction of the parties.[113] The Nomonhan Incident occurred soon after the conclusion of the fisheries agreement. While the prosecution have now abandoned (as was mentioned above)[114] any claim that Mr. TOGO bears guilt as a result of that incident, it is worth pointing out that the undisputed evidence is that it was he who took the initiative in suggesting both to the Soviet Government and to his own Foreign Ministry that the incident be settled by diplomatic action.[115] Foreign Commissar Molotov afterward stated that "it had been his pleasure that he had been able to solve the Nomonhan Incident with the cooperation of Ambassador TOGO and that Russian-Japanese relations would become more and more friendly in the coming year, thanks to the

113. Id. (Tr. 35,636); testimony of NOGUCHI, Yoshio, (Tr. 35,376).

114. Supra, §7.

115. ~~Testimony of OTA (Tr. 23,092).~~

efforts of Ambassador TOGO."[116]

As a result of the Nomonhan settlement a second item of Mr. TOGO's program of 1933 for improvement of Soviet-Japanese relations came about in part -- the demarkation of the Soviet-Mongolian borders with Manchoukuo. The TOGO-Molotov Agreement of 9 June 1940 settled the border in the Nomonhan area, and in consequence of that agreement a border commission was established, held numerous meetings in Chita and the Nomonhan area, and actually marked that part of the border, thus -- for the first time in the long history of the border question -- achieving tangible results.[117] This demarkation (not, as the prosecution allege, "redemarkation") of the newly-agreed border effected division between the parties of the disputed territory; as has been pointed out elsewhere,[118] a simple comparison of maps in evidence demonstrates that there is no substance in the prosecution's assertion that this border coincides with that claimed by the Soviet Union prior to the incident.

25. After settlement of the Nomonhan Incident Mr. TOGO undertook to capitalize on the friendly spirit

116. Testimony of NOGUCHI (Tr. 35,376) and TOGO (Tr. 35,638).

117. Testimony of OTA (Tr. 23,092) and TOGO (Tr. 35,637-38).

118. Summation for the defence, Section "H," "The Soviet Case," §§10, 24 (Tr. 41,727-32, 42,765-71).

of good relations prevailing to conclude a non-aggression pact, in accordance with his proposal of long before that the Soviet desire in that matter should be acceded to. This required first the persuasion of his own government before authorization could be secured.[119] When it had been obtained, the negotiations were commenced, and had resulted in a draft agreement when Ambassador TOGO was recalled to Japan in August 1940.[120] The contents of the draft then agreed upon and of the neutrality pact actually executed in the following April are all but identical;[121] so that Mr. TOGO's own efforts had in fact resulted in the eventual accomplishment of the third of his objectives in his 1933 plan for improvement of relations with the U.S.S.R. As a result of his unceasing insistence between 1933 and 1940, the Chinese Eastern Railway problem had been solved by its sale to Manchoukuo, as he had recommended; a beginning had been made on the demarkation of Soviet borders with Manchoukuo, as he had suggested be done; and the long-standing Soviet desire for a non-aggression pact had, as he had so strongly urged, been complied with. It may well be with astonishment that

119. Testimony of OTA (Tr. 23,103) NOGUCHI (Tr. 35,381) and TOGO (Tr. 35,638).

120. Testimony of OTA (Tr. 23,103), NOGUCHI (Tr. 35,382) and TOGO (Tr. 35,639-40).

121. Compare the draft (Tr. 35,381) with the 1941 Pact, Ex. 45 (Tr. 513).

the Tribunal finds this man charged as a criminal against the Soviet Union.

26. One last -- and curious -- piece of prosecution sophistry remains to be dealt with, before we leave Soviet questions. This concerns the recall of Mr. TOGO from Moscow as it bears on his attitude toward aggression. For the first two years of these proceedings the prosecution's contention was that "when Foreign Minister MATSUOKA in the summer of 1940 recalled a great number of Japanese diplomatic representatives, whose attitude was not supposed to be in accordance with Japan's new foreign policy, TOGO remained as Ambassador to the Soviet Union."[122] This was false, and the prosecution repeated it knowing it to be false, because the error in the personnel record upon which the statement was based had been called to their attention, and they undertook to and presumably did investigate it.[123] Now that the evidence is in, and that evidence shows Mr. TOGO to have been one of those recalled and requested to resign by Foreign Minister MATSUOKA -- or in other words, that his attitude was not "in accordance with Japan's new foreign policy" (i.e., of Axis alignment and aggression) -- it might be expected that

122. Tr. 6270, 16943.
123. Tr. 6364.

this line of argument would be dropped. Not at all! Now a change comes o'er the spirit of their dreams; now it is that "his recall was not due to the fact that he was not in favor of Japan's policy of aggression but to the fact that, unlike MATSUOKA, he still believed that the aims of aggression could generally be obtained by measures short of further war."[124] This is more than merely casuistic. The contention is supported by no reference to evidence, and of course can be supported by none because it is untrue. There is no evidence whatever that the defendant TOGO was recalled for any such reason as is mentioned. He could not have "still believed" in aggression, for every iota of proof in the record shows that he had never believed in it, but always opposed it, and the prosecution have confessed this in disclaiming any charge of conspiracy against Mr. TOGO prior to 1941. The whole thing is a pure creation of the prosecution's imagination, lacking the virtue even of being adapted to any of the probabilities which he might more or less plausibly have conjured up. The fact is that there is no evidence whatsoever to show why Mr. TOGO was recalled from Moscow except MATSUOKA's announcement that the renovation of the foreign service was necessary to secure the new

124. Summation, sWW-10 (Tr. 41,885).

foreign policy introduced by him,[125] and what inferences can be drawn from the subsequent events: that MATSUOKA repeatedly requested his resignation, and that it was repeatedly refused with the statement that giving it would be tantamount to approval of the MATSUOKA policies,[126] for which reason it would not be given. Neither cross-examination nor rebuttal evidence purported to attack this evidence. (Incidentally, there is evidence in the record neither to support the prosecution's assertion that Mr. TOGO's recall from Moscow occurred several days after that of others similarly dismissed,[127] nor to explain such a delay if it did exist.)

27. But on this matter of Mr. TOGO's opinions the prosecution have a fondly-cherished piece of evidence, which they have wrung quite dry in trying to distort it into something of the semblance of proof. This is one of those memoranda of the German Foreign Office -- by one Knoll, this time -- which are held up as paragons of probative value when they mention the names of any of these defendants. Using it as evidence against the defendant TOGO requires not only misquoting and distorting it but mistranslating it as well. Here

125. Ex. 548 (Tr. 6296).
126. Testimony of TOGO (Tr. 35,641) and KADOWAKI, Suemitsu (Tr. 35,517).
127. Summation, SWW-10 (Tr. 41,885).

is the way the prosecution put it:

"This (the figment of the imagination quoted above) is borne out by the statement made by Ambassador KURUSU, who, in June 1940, made it clear that for a change from reliance upon the Western Powers to collaboration between Japan and Germany, improvement of Japanese-Russian relations for the duration of the present war was necessary. Both TOGO and KURUSU were working feverishly for this and it was becoming more and more clear that Japan's future lay in the south and that the enemy in the north must be made a friend."[128]

This rune can have significance only if it means that KURUSU knew TOGO's opinion, and was stating it to Knoll; no contention is made that Mr. TOGO had any personal connection with the matter. But it is undisputed in the evidence that Mr. TOGO neither held such an opinion nor expressed it to Mr. KURUSU[129]; he denied having expressed such an opinion to Mr. KURUSU, and the prosecution did not cross-examine on the denial nor produce Mr. KURUSU as a witness to refute it. Nor did Knoll even report KURUSU as saying these words, but only "somewhat as follows." Also, the memorandum of Knoll as it appears in evidence does not quote KURUSU

128. Summation, SWW-10 (Tr. 41,885-86).
129. Testimony of TOGO (Tr. 35,662).

as stating that TOGO held any such opinion; the only clause relating to TOGO is that "TOGO and I are feverishly working for" betterment of relations 130 -- that is the prosecution's English version; of course the "lebhaft" of the original German does not connote "feverishly." We may, at all events, assume the truth of the statement that Ambassador TOGO was working vigorously ("lebhaft") for improvement of Soviet-Japanese relations -- that was his business as ambassador -- and we may assume likewise that Ambassador KURUSU was aware of the fact, since he would have known of the settlement of the fisheries and Nomonhan questions. (KURUSU himself, as Ambassador to Germany, of course had no connection with Soviet-Japanese relations or their improvement.) But Ambassador KURUSU stated no connection between Mr. TOGO's vigorous efforts for improvement of Soviet-Japanese relations and Japan's future in the south. What he was reported to have said was -- "somewhat" to the effect that -- "it becomes more and more clear in Japan that" the future is in the south -- not that it becomes clear in Moscow, not that TOGO said so or thought so, not even that he, KURUSU, thought so. Finally, the whole thing is alleged to be only Ambassador KURUSU's opinion of Ambassador

130. Ex. 3613 (Tr. 35,386).

TOGO's opinion, immaterial in any event, and which if he had actually held it he would doubtless have been produced to swear to instead of stating it through the medium of the German language and one Knoll. Of course it is absurd to speak of Ambassador TOGO's working for Japanese collaboration with Germany, when as we shall see in a moment he had just been transferred from the post of Ambassador to Germany because he had engaged himself while there in working -- in truth "feverishly" -- to sabotage any closer Japanese-German collaboration. The final proof that Ambassadors TOGO and KURUSU did not share this opinion is found (upon the prosecution's theory that what a public servant signs he approves) in the fact that the one was recalled, while the other remained to affix Japan's signature to the Tripartite Pact.

This incident of Mr. TOGO's recall from Moscow has been given treatment out of all proportion to its intrinsic importance, and designedly. No better illustration can be found of the way the prosecution's case against this defendant for whom I speak has been built up of surmise, gossip, bold fabrication of inference in the face of unequivocal and undisputed evidence, prejudicial matter; of the prosecution's reckless disregard for the defendants' rights, for their

own solemn commitments and for common, ordinary fairness; and of the flimsy case which has actually been made. It is an irresponsible prosecution which does this.

28. The prosecution's case wants yet a bit more analysis. In the opening statement of its Soviet phase ten of the defendants were listed as those guilty of "crimes" against the Soviet Union; the name TOGO did not appear.[131] In the presentation of the evidence of that phase the name TOGO was twice mentioned: as a signer of the TOGO-Molotov Agreement, provided for demarkation of the Mongolian-Manchurian border after the end of the Nomonhan fighting;[132] as a member of a society, the Kokusaku Kenkyukai.[133] There is also a mention of a donation to that society by the Foreign Ministry at a time when Mr. TOGO was Minister.[134] Since in the closing statement of the prosecution Mr. TOGO is added as an eleventh arch-criminal, one who did not stop "at the heaviest crimes" against the U.S.S.R., the crimes in question must be those which that evidence discloses.

131. Tr. 7213-85.
132. Ex. 767 (Tr. 2147).
133. Ex. 683 (Tr. 7400).
134. Ex. 678 (Tr. 7358).

135.

29. Nomonhan has already been referred to, and except for one point need not be further discussed. This remaining point is that when the prosecution announced that they were abandoning their charges against Mr. TOGO for his actions prior to 1941, they reserved "the right to interrogate, if available, the accused TOGO as to his signature appearing upon. . . a map that was signed by both Mr. Molotov and Mr. TOGO after the Nomonhan Incident.[136] He was "interrogated" -- cross-examined -- concerning the map, and identified a photostatic copy as being a copy of that initialed by him and Commissar Molotov; the photostatic copy (which proved to be of the identical map introduced by the defense[137]) was introduced into evidence, and there the matter ended,[138] with no proof or mention of heavy crime. There remains the Kokusaku Kenkyukai.

30. That the prosecution have turned to the Kokusaku Kenkyukai only in despair of otherwise creating the faintest suspicion of Mr. TOGO's attitude toward the Soviet Union is shown by the fact of their not mentioning him in their opening statement, when but

135. Supra, ss 7. 25.
136. T. 35347-48.
137. Ex. 2660 (T. 23149).
138. Ex. 3652 (T. 35973); testimony of TOGO (T.35978, as corrected T.).

on the following day they were themselves to introduce the evidence on the subject. The evidence concerning this ridiculous organization was as follows. For the prosecution, the testimony of one YATSUGI, chief of the business bureau of the society, to the effect that it was purely a "private organization," composed of "non-official civilian members" who "had no responsibility to the association except payment of their established membership fees"; funds were solicited, and received, from governmental as well as private sources; but it is very doubtful whether a contributor could have had any understanding of what its money was being spent for, the explanation accompanying the request for funds being that the society "in pursuing a study of Greater East Asiatic problems" requested support by donation from "both private and official sources."[139] A membership list, showing as a member "TOGO, Shigenori, Member of the House of Peers."[140] A number of ludicrous "research documents" of the society.[141] For the defense, the testimony of the founder and president of the society (he was not cross-examined) to the effect that the

139. Testimony of YATSUGI, Kazuo (T. 7397).
140. Ex. 683 (T. 7400).
141. Exhibits 679 (T. 7369), 680 (T. 7371), 682 (T. 7374), 684 (T. 7404) and 685 (T. 7411).

donation received from the Foreign Ministry during Mr. TOGO's incumbency was not discussed with nor received from him, but was given by the vice-minister; that according to his recollection Mr. TOGO joined the society after resigning his portfolio as foreign minister in 1942, but was a "half-hearted and uncooperative member of the society," who did not even attend meetings and did not receive the "research documents" such as those introduced into evidence.[142] Mr. TOGO's own testimony (on which he was not cross-examined) was that he never paid dues to the society, never attended meetings, never took office in it and never had the slightest knowledge of what it was doing or proposed doing; that he took out his membership at the solicitation of a personal friend -- as any man in public life does take out such memberships, without inquiring into the details of the organization's activities -- and that he had no knowledge of the donation made to the society by the Foreign Ministry.[143] All this evidence stands uncontradicted in the record. The totality of the prosecution's proof of the defendant's relations with the society is the showing of the listing of his name among those of its members, in 1942.

142. Testimony of OKURA, Kimmochi (T. 35613).
143. Testimony of TOGO (T. 35626-27).

If Mr. TOGO became a member of the society only after his retirement to private life; if he never knew the nature of its activities, never received nor knew the contents of its documents, never paid dues, attended meetings or served the society, how "heavy" is the crime of his membership? The fact is that the whole Kokusaku Kenkyukai question is farcical, that proof of casual membership in one of this prolific clan of Japanese societies alleged to have promoted aggressive aims is less than no proof of the policy or state of mind of the defendant TOGO. Yet it is this membership which "emphasizes Mr. TOGO's active role" in aggression against the USSR! What can be said of a prosecution which in a capital case would set such rubbish as forual membership in a society against the deeds of a lifetime?

31. Lastly, the prosecution's summation contains the statement that as Foreign Minister in 1941-42 Mr. TOGO "should bear responsibility for the preparation of a war of aggression against the USSR."[144] There is of course no citation of authority to this point, and can be none. The prosecution's allegation that "new war plans" against the Soviet Union existed in 1941 and 1942 is founded on a number of facts, none

144. Summation, SH-203 (T. 39973-74).

of which either concerns the foreign minister or supports the conclusion. The discussion of this subject generally has been made elsewhere, and need not be repeated; that discussion may be referred to for the demonstration that the Army General Staff's annual operations plans did not constitute war plans against the USSR and that the Kantokuen plan of reinforcement of the Kwantung Army had nothing to do with a decision for war.[145] There is in no event, nor can be, any contention that the foreign minister had the slightest knowledge of the army's operational plans; Mr. TOGO has specifically testified that he never knew of the existence of the Kantokuen.[146]

The prosecution's main argument that a war was planned against the USSR in 1941 is the Imperial Conference decision of 2 July 1941,[147] with which of course this defendant had nothing to do, not being in office on that date. If that decision had constituted, as the prosecution allege it to have done, a decision for war; and if pursuant to it plans for war had been made (which they are nowhere shown to

145. Defense summation, Sec. "H," "The Soviet Case," §§31-35 (T. 36766-71).
146. T. 35743.
147. Exhibits 588 (T. 6566), and 779 (T. 7904).

have been[148]), this defendant would not be liable as a result thereof, in accordance with the prosecution's admission of the position of a man who merely acts "pursuant to an already established policy."[149] There is, however, affirmative evidence that no war against the USSR was planned after the TOJO Cabinet took office. The prosecution would brush aside the unequivocal testimony to this effect of General TANAKA, Shinichi[150] by the statement that it is "wholly unsupported by any documentary evidence."[151] They overlook their own evidence that the Liaison Conference decided in the middle of November[152] that "we continue the negotiation founded on the clause No. 1 of the 'Principle of Negotiation with the Soviet Union' decided at the Liaison Conference. . . on August 4, 1941."[153] There is no evidence that there actually were any such "negotiations" with the USSR; but this Liaison Conference decision stands as proof that war was not decided on, and as the confirmation of all the defense evidence to that effect. All that the prosecution can offer to the contrary is this

148. Defense summation, Sec. "H," "The Soviet Case," §39 (T. 39776).
149. Summation, §K-3 (T. 40539).
150. T. 23337.
151. Summation, §23-A (T. 41905).
152. Testimony of TOJO (T. 36344).
153. Exhibit 1169 (T. 10335).

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monstrous sophism: "In substantiation of the fact that military operations against the USSR were purely a matter of timing, it was agreed at a Liaison Conference in the latter part of November that if war with Russia broke out, which was not impossible, Japan would occupy the Russian Maritime Province." 154. (This statement, by the way, is supported by citation of the testimony of TANAKA only -- that which just above was "wholly unsupported by any documentary evidence" and was doubted to have "any basic foundation of fact at all.") If war with Russia broke out, they said -- ergo, war was planned! The breaking out of war they considered "not impossible" -- therefore Japan had planned it! And if it came, they planned, the Maritime Province would be occupied -- Japan would resist, which shows a design for war, made in advance! The prosecution would far better have left this matter as it stood in Section WW23 of their summation as originally circulated, before they conceived the afterthought of Section WW23-A:

Around the middle of November it was decided that war with Russia would be avoided, and that an effort would be made to bring about peace between Germany and Russia . . . Later, in the same month,

154. Summation, SWW-23-A (T. 41905).

the Liaison Conference agreed that if war with Russia broke out, which was not impossible, Japan would occupy the Russian Maritime Province.[155]

This accords with the evidence and the facts.

What is quite beyond dispute is that Foreign Minister TOGO, so far from participating in the plotting of any war against the Soviet Union, treated the maintenance of Soviet-Japanese neutrality and observance of the Neutrality Pact as the fundamental policy of the government. He has so testified,[156] without cross-examination; there was no cross-examination of his witnesses who testified that "from the time that he assumed office Mr. TOGO worked assiduously for the strict and faithful observance, by both parties, of the neutrality then prevailing," and gave details of his efforts.[157] Equally indisputable is it that Mr. TOGO, from the time of becoming Foreign Minister, had had and had worked for realization of the desire to bring about a Soviet-German peace. This point serves the prosecution an opportunity for an altogether brilliant manipulation

155. Original summation, SWW-23.
156. T. 35742-43.
157. Testimony of NARITA (T. 35395) and NOGUCHI (T. 35383-84).

of the evidence of logic. This desire of Mr. TOGO's was testified to by three witnesses;[158] rather, however, than cross-examine any one of them, the prosecution write three words: This desire, they say, "if it existed, . . ."[159] As to the logic: the desire "could only have been born out of the hope that Japan's burden in a general war would be lessened if her opponents could be divided in such manner as to permit of their defeat singly." Perhaps we did not hear correctly? Surely, they meant to say, "in such manner as to permit the USSR, freed of her war with Germany, to concentrate her entire power against Japan in that war which, if you remember, had been determined upon by Japan and was 'purely a matter of time'"? What an astute sugges ion, that Foreign Minister TOGO, scheming for war against the USSR, would undertake before the war started to see to it that Germany, who would have been her ally in it, withdrew from it and gave her no aid! What an insult to this Tribunal, to suppose that such a rigamarole can be imposed upon it in the guise of argument!

158. Testimony of TOGO (T. 35792), NOGUCHI (T. 35383-84) and SATO (T. 35553-54).
159. Summation, SWW-23-A (T. 41906).

Mr. TOGO's "active role" in the "heavy crime" of this imaginary preparation of a hypothetical war against the Soviet Union is "emphasized" by the nominal membership in the Kokusaku Kenkyukai which we have already considered. His connection with a Japanese-Soviet war thereafter until his resignation in 1942 consisted chiefly of his rejections of the German request that Japan attack the USSR contrary to her treaty obligations.[160]

32. The "heavy crimes" which have distinguished Mr. TOGO's career of "intense hostile activities against the USSR" might, then, be summarized. He embarked on his course of crime by negotiating with the USSR the treaty of 1925 by which Japan extended recognition to the new Soviet Union, a treaty not yet repudiated by the USSR as fraudulently induced by Japan, as injurious to it, or as an act of aggression, but relied on in the Indictment herein as valid, binding, in full force and effect and conferring valuable rights and benefits upon the USSR. Next, becoming Bureau Director in charge of Soviet Affairs, he proposed secretly to his own government a policy

160. Testimony of TOGO (T. 35746); Exhibits 2751 (T. 24615), 2762 (T. 24737) and 3508 (T. 33970).

of improving relations with the USSR by acceding to her long standing desire for a nonaggression pact, by accepting her offer to sell the Chinese Eastern Railway, and by undertaking the demarkation of Manchukuo borders with the USSR. Thereafter in turn he accomplished consummation of the sale of the Chinese Eastern Railway by the USSR to Manchukuo, a transaction over which the Soviet Union expressed great satisfaction; he settled the Nomonhan Incident and as a consequence made the first agreement for demarkation of part of the Manchukuoan boundary with Soviet territories; he initiated, and all but brought to fruition, negotiations for a nonaggression pact. He left the Soviet capital, his ears ringing not with the vituperations and imprecations against a criminal now hurled at him, but with expressions of the regret of the Foreign Commissar at his recall.[161]

161. Testimony of TOMIYOSHI (T. 35524) and NOGUCHI (T. 35379-82).

33. Can there be a better demonstration of the prosecution's method -- of postulating a defendant's viciousness, then arguing from the postulate that his every act must have been criminal -- than this treatment of the Soviet charges against Mr. TOGO? It is with a logic peculiarly their own that the prosecution can argue at will that refusal to accept a non-aggression pact proffered by the U S S R is evidence of aggressive design[162], and that conclusion of a non-aggression pact at Japanese initiative equally is evidence of the same design[163]. Only the prosecution, it is ventured, could solemnly argue at once that a defendant is guilty of criminal aggression when he acts in a way calculated to bring about bad realtions between nations, and that when he is "working vigorously" (or "feverishly", if you like) to improve relations it is evidence of his attachment to a policy of aggression short of war.

With this we leave the Soviet section of the case.

GERMAN RELATIONS

34. Concerning Mr. TOGO's early (1920-21[164]

162. T. 7,236-37; Summation for the Defence, Section "H", "The Soviet Case", Sections 5-6 (T. 42,712-20).
163. Summation, SH-180 (T. 39,948).
164. Not, as the prosecution allege, 1920-23. The personnel record, Exhibit 127, shows his appointment

and 1929-32) periods of service in Germany[165] it is unnecessary to speak here, for they give rise to no matters touched upon in evidence. We therefore begin our investigation of his connection with German affairs with his service as Director of the European-Asiatic Bureau, when the Anti-Comintern Pact came up. First let us, however, remind ourselves of his German policy as expressed in 1933, in his report to the Foreign Minister. He demonstrates little enough preoccupation with German relations there, for the whole discussion of them occupies only a page and a half[166] The prosecution's statement that at the time of composition of that document "Hitler had only just come to power in Germany and his future foreign policy had not yet taken shape"[167] is not correct; the author clearly recognizes the significance of the rise of the dictatorship of the right in Germany[168], the German

164. (Continued)
on 18 May 1921 as "diplomatic commissioner", which is a unique translation of "gaiko jimukan", "foreign service secretary", meaning service in the Foreign Ministry.

165. Exhibits 127 (T. 791) and 3,612 (T. 35,385).
166. Exhibit 3,609-A, pp. 13-14 (T. 35,423-24).
167. Summation, SWW-4 (T. 41,871-872).
168. Exhibit 3609-A, p. 13.

intention to upset the structure of the Versailles peace[169] and the undesirability of Japan's undertaking any political intimacy with Germany. He recommends, therefore, that Japan's efforts toward Germany "should be confined to promoting friendly relations"[170]; only that Japan make efforts to have Germany understand our international position in the Far East and at the same time to promote closer contact in culture and science between the two nations, so that she may not deviate from her traditional neutral attitude toward Far Eastern problems[171].

While the author thus recommends the cultivation of good relations with Germany, there is no suggestion in the document that there should be any intimacy, or political connection of any sort, with her.

As Mr. TOGO testified (not "admitted"[172]), he as director of the bureau in charge of the negotiations which led to the conclusion of the Anti-Comintern Pact had a close connection with it[173]. From this the prosecution (who once confessed that they could not even contend that Mr. TOGO had taken part in any conspiracy prior to 1941) draw their inevitable conclusion

169. Ibid.
170. Id., p. 27.
171. Id1, p.14 (T. 35,424).
172. Summation, SWW-5 (T. 41,875).
173. Testimony of TOGO (T. 35,642).

that he supported, approved, and, indeed, all but conceived the pact as an aggressive measure against the U S S R[174]. Let us consider what the evidence is. The first information available in Tokyo of the matter which developed into the Anti-Comintern Pact was when report was received by the Foreign Ministry, from the Charge d'Affaires in Berlin, to the effect that negotiations were in progress there for a defensive alliance between Germany and Japan[175]. Upon receipt of this advice Bureau Director TOGO requested specific information from the War Ministry and General Staff, but apparently could secure no details[176]. Soon afterward, the Japanese Ambassador to Germany, Viscount MUSHAKOJI, then on the point of returning from Tokyo to his post, was instructed by the Foreign Minister (instructions repeated by telegram after his arrival in Berlin) that it "seemed necessary" to conclude a political agreement of some nature with Germany, and that he should, therefore, give study to the matter upon resuming the duties of his post[177]. In July, accordingly, Ambassador MUSHAKOJI reported a German

174. Summation, §WW-5, WW-6 (T. 41,874-81).
175. Testimony of Yamaji AKIRA (T. 35,408) and TOGO (T. 35,643).
176. Testimony of TOGO, loc. cit. supra n. 175, and WAKAMATSU Tadaichi (T. 33,711-12).
177. Testimony YAMAJI (T. 35,409) and TOGO (T. 35,644).

proposal, basically the Anti-Comintern Pact, which was referred to the Foreign Ministry Bureau presided over by Mr. TOGO[178]. Let me emphasize this -- Mr. TOGO was not Premier, not Foreign Minister; he was presiding over a bureau. It should be hardly worth arguing that a bureau director does not make the national policy, or any part of it -- or, for safety's sake, let us put it this way: he should not make policy, and in the absence of evidence that he went beyond his proper functions there can be no presumption that he did so. A bureau director may make recommendations -- he is expected to, is worth little if he doesn't -- but when those are accepted or rejected, when policy is decided, his is only the ministerial duty of carrying into effect so far as it concerns him the policy ordered by his superiors.

35. It is undisputed that considerable revisions were made in the draft Pact by Mr. TOGO -- none of the witnesses who testified for him on these questions was, of course, cross-examined. The prosecution, however, attempt the mutually contradictory tasks of at once refuting the defendant's statement that he was opposed to the Pact as a whole and in detail and minimizing the extent of his success in

178. Testimony of YAMAJI (T. 35,409) and TOGO (T. 35,644-46).

moderating its terms. That Mr. TOGO was opposed to this Pact specifically, to rapprochement of any political nature with Germany, and to the execution of political agreements on an ideological basis in general, cannot be doubted in view of the wealth of unchallenged evidence to that effect. He himself has testified (without cross-examination) that he "had opposed from the outset the idea of a pact based on Nazi ideological grounds, and so stated to Foreign Minister ARITA"[179] that he endeavored

"to persuade my superiors as well as the military authorities concerned of the desirability of making the proposed Japanese-German agreement as weak as possible...that it should be limited strictly to the bare minimum of what had been determined as the national policy to be Japan's needs; and particularly that the matter should be so managed, and the treaty so framed, that it should not injuriously affect our relations with Britain and the United States, as well as with the U.S.S.R., unnecessarily[180] ;...it was my feeling that since Japan had, despite what seemed to me the dangers of such a liaison, determined upon the national policy of entering into the Anti-Comintern

179. Testimony of TOGO (T. 35,644).
180. Id. (T. 35,644-45).

Pact with Germany, it was essential to keep the foreign policy of our nation on a rational and balanced basis that efforts be made to maintain a closer relationship with the democratic powers--especially England[181]."

Other witnesses have testified (without cross-examination) to the opinion of Mr. TOGO in the matter as they learned it then: "his personal opinion was that he did not think it proper to set a political agreement against an ideology; and that, in principle, he could not agree to taking such measures, though it seemed that it was unavoidable in consideration of the circumstances"; the Anti-Comintern Pact "would not necessarily strengthen the international position of Japan; on the contrary, he was afraid that it might weaken it."[182] "I heard at the time that Mr. TOGO's opinion was that the conclusion of a political agreement for the purpose of coping with an ideology was meaningless"[183]; "Director TOGO told me that he was against making any international agreement on the basis of ideologies, because they would only result in the repetition of the failure of the Holy Alliance

181. Id. (T. 35,647).
182. Testimony of MORISHIMA Morito (T. 35,487).
183. Testimony of NARITA Katsushiro (T. 35,391).

and, therefore, he was against a Japanese-German Anti-Comintern Pact"[184]; "When the Anti-Comintern Pact was concluded during his tenure as Director of the Foreign Ministry Bureau of European and American Affairs, he commented more than once that the making of alliances on ideological grounds was undesirable, that Japan should not adopt a policy which would alienate Great Britain and America, to say nothing of the U.S.S.R., and that the effect on Japan's international position from entering into such an arrangement would be bad."[185] These witnesses -- has it been mentioned?--were not cross-examined.

Apply to this situation the prosecution's own test.

"No man has been charged in this proceeding because of any act committed or any statement made by him in the course of his official duties pursuant to an already established policy if those matters were his only connection with that aggressive policy[186]."

The policy of the Anti-Comintern Pact had been established when Ambassador MUSHAKOJI was given his orders, before ever the matter was referred to Mr. TOGO's bureau for management. Mr. TOGO promptly voiced

184. Testimony of YAMAJI Akira (T. 35,410).
185. Testimony of Durt Meissner (T. 35,461-62).
186. Summation, SK-3, (T. 40,539).

opposition--"I had opposed from the outset".

"...no man has been charged with...crimes against peace...unless he is in some way responsible for the aggressive policy followed by Japan, which gave rise to those crimes[187]."

Is a bureau director who, having no part in the decision of the policy, opposed from the outset and worked to offset the policy and to weaken the agreement to the extent that he could, responsible for the aggressive policy, it if was aggressive?

36. The prosecution, however, dispose of this mass of evidence of Mr. TOGO's personal opposition to the Anti-Comintern Pact with the statement that his testimony (that of the other witnesses not being mentioned) "ignores the fact that, whatever may be said of the Anti-Comintern Pact itself, the attached Secret Agreement was clearly not one of ideologies but contained a very concrete alliance against Russia."[188] This argument "ignores" several facts. The objections so repeatedly expressed by Mr. TOGO at the time were not to "the Anti-Comintern Pact, except for the annexed secret agreement", but were to "the Anti-Comintern Pact", which in the ordinary acceptation of language includes

187. Ibid.
188. Summation, SWW-5 (T. 41,876).

the preamble, the main text and the various articles thereof, and the annexes, secret or otherwise. His objection on ideological grounds would apply equally to the entirety of the document, which as a whole purports to be an "anti-Comintern Pact"--that is, a pact to establish some policy of action against the Comintern and the threat of the spread of Communist ideology. That is one fact ignored by the prosecution. Another fact which they ignore is that the objection because of the ideological nature of the pact is only one of several, which Mr. TOGO mentioned, to the Pact; he had repeatedly contended that the pact would weaken the international position of Japan, would alienate Britain and America, as well as, of course, the U S S R, and would have a bad effect on Japan's international position. A third fact ignored by the prosecution is that the secret agreement to the Anti-Comintern Pact, alleged by them to be "a concrete alliance against Russia", is no such thing. Can they have read it?

"ARTICLE I

"Should one of the High Contracting States become the object of an unprovoked attack or an unprovoked threat of attack by the Union of Soviet Socialist Republics, the other High Contracting State

obligates itself, not to carry out any measures which would, in their effect, be apt to relieve the position of the Union of Soviet Socialist Republics.

"Should the case, mentioned in Clause I occur, the High Contracting States will immediately consult which measures they will use to preserve their common interests.

"ARTICLE II

"The High Contracting States will during the validity of this agreement and without mutual assent conclude no political treaties with the Union of Soviet Socialist Republics which do not conform to the spirit of this agreement" 189.

This is what the prosecution are able with a straight face to describe as "a concrete alliance", whatever that may be. Certainly it is not a pact of mutual assistance; the parties' obligations are quite passive, not to do that which would lighten the burden of the Soviet Union in the event of conflict with the other contracting party, and to "consult" over measures which may be desirable; there is no suggestion of an obligation of positive assistance. This is on its face substantially the equivalent of a neutrality pact, nothing more--rather, a good deal less than the

189. Exhibit 480 (T. 5,937).

Soviet-Japanese Neutrality Pact of 1941[190], for in this one the obligation of maintenance of neutrality is limited to the case of "unprovoked" attack by the U S S R. Compare this secret agreement with the Anglo-Japanese Alliance[191], a defensive alliance, to see whether this amounts to one. A fourth fact ignored by the prosecution is that they, themselves, the prosecution, long since admitted that it was not the Anti-Comintern Pact, nor the secret agreement thereof, which they contended to be criminal, but the use to which it was put. Let us notice this admission:

"THE PRESIDENT:...I should like to ask Mr. Comyns Carr what case the prosecution allege the defense have to meet in regard to the Anti-Comintern Pact.

"MR. COMYNS CARR: Your Honor, in our submission it really raises three points: If this Anti-Comintern Pact was nothing more than appears on its face, a mutual agreement to exchange information and even to assist one another in resisting the spread of communism in their own countries, then I would say no case at all. Various people may agree or disagree with such a policy, but it involves no breach of international law. But, when it is used...as an excuse for armed intervention... we submit, that does involve a serious

190. Exhibit 45 (T. 513).
191. Exhibit 2,292 (T. 17,305).

breach of international law..."[192]

The use to which the Pact was in future to be put has nothing to do with the intention with which the Director of the European-Asiatic Bureau of the Foreign Ministry at the time of its negotiation considered what it appeared on its face to be. There is not a suggestion in the evidence that Mr. TOGO believed, suspected or even heard that the Pact or its secret agreement was anything other than appeared on its face, and had he therefore even enthusiastically supported the Pact he would, by the prosecution's own standard, have been guilty of "no breach of international law". The taking into account of this fourth fact--one of their own creation--ignored by the prosecution must result in the conclusion that it would not have been criminal not to have opposed execution of the Anti-Comintern Pact.

As the prosecution point out,

"The real significance of the Anti-Comintern Pact did not lie in its immediate or practical effects... It lay in the fact that by concluding the pact Japan took her first step toward allying herself with Germany, the then leading aggressive nation of Europe, if not of the world[193]."

192. T. 22,451-52.
193. Summation, §F-109 (T. 39,456).

It is precisely in his reluctance to see Japan take that first step of alliance, reluctance destined to be his reaction to all subsequent steps, that the Tribunal may find the real significance of Mr. TOGO's opposition to the Anti-Comintern Pact.

37. We may take it, however, as fully established that the defendant TOGO was opposed to the Anti-Comintern Pact at the time that it came to him for study and management. It is, on the other hand, equally clear that the policy of concluding such a pact had been determined by the higher authorities, and that the opinion of Bureau Director TOGO of that policy neither was solicited nor would have been welcomed[194]. What should the bureau director who feels the policy undesirable do in such case? What can he do but work for the alteration of the document to offset so far as possible the evil effects which he foresees? It is undisputed in the record that--as he testified without provoking cross-examination--Mr. TOGO endeavored

"to persuade my superiors as well as the military authorities concerned of the desirability of making the proposed Japanese-German agreement as weak as possible. In other words, I argued that it should be limited strictly to the bare minimum of what

194. Testimony of TOGO (T. 35,644), NARITA (T. 35,391) and YAMAJI (T. 35,410).

had been determined as the national policy to be Japan's needs; and particularly that the matter should be so managed, and the treaty so framed, that it should not injuriously affect our relations with Britain and the United States, as well as with the U S S R, unnecessarily.

"...Above all, I strongly asserted that the secret agreement attached to the Pact...should be of strictly defensive nature, and I insisted on changes to that effect[195]."

The prosecution attempt to meet this by adopting the position that Mr. TOGO's testimony (which they did not see fit to cross-examine on) is probably not true, but that in any event his efforts toward changing and weakening the Pact, if they existed, amounted to nothing. From this point let us follow their argument step by step. The Foreign Ministry policy toward the Anti-Comintern Pact was drawn by order (not "request", as the prosecution have it; a minister orders his subordinates), by Mr. TOGO's European-Asiatic Bureau, and naturally under his direction[196]; and he has testified that that statement of policy to an extent embodied his views[197]. But this

195. T. 35,644-46.
196. Exhibit 3,267 (T. 29,885).
197. T. 35,645.

policy, object the prosecution, "makes no mention of any objection to the pact whatsoever"; in view of which "his assertions regarding his opposition, no mention of which is to be found in the document drawn up by him at the time, cannot be given weight."[198] How naive! Do the prosecution expect that the Tribunal will believe that a governmental bureau director, who is personally opposed to a policy but is directed to manage it conformably to his government's decision, will submit a proposed policy based on his personal beliefs and running counter to the official one? Could he better insure the failure of the policy to which he was attached than by that very act of insubordinate stupidity? The personal opinions of public servants are not the subject of the debates from which emerges a national policy; it was not TOGO Shigenori's opinion the preparation of which was ordered, it was that of the Foreign Minister, to be drawn by the Director of the European-Asiatic Bureau--which of course means that it was to be a synthesis of the views of the Bureau. No; what a sane public servant, to whom the matter had importance, would do would be, not to submit his personal opinion, but precisely what this one did: persuade his superiors

198. Summation, SWW-5 (T. 41,876-77).

so far as he is able to adopt his views, then loyally draw the statement of policy as ordered by them, prepare what was to be the Minister's opinion to fit his official policy as laid down in the order to prepare it. Even the failure to commit acts of insubordination and disloyalty to his own country is, it is submitted, not the conclusive proof of evil design against others.

38. Moreover, the prosecution continue, the defendant "makes much of the changes in the text of the Anti-Comintern Pact and the Secret Agreement which were proposed by him and in part incorporated in the final agreement." (They now admit the failure of their original position, that he did not oppose the pact at all.) "A simple comparison between the proposals made by him and the final texts of the two agreements should suffice to show of how little importance they were and how the final agreement was not thereby in any manner altered in character."[199] The "simple comparison" is all very well, and we shall make it in just a moment; but comparison of what? Can it be in good faith, this suggestion that we compare Mr. TOGO's proposal and that final form of the agreement

199. Summation, SMA-5 (T. 41,877).

e and his witnesses say were the same?

"The preamble particularly...was greatly changed while the document was in the hands of the European-Asiatic Bureau...with the result of the form as it finally stands...The Text of the Pact, moreover, was rewritten...The term of the pact was reduced...I also removed...provisions...I thus succeeded in making the Pact more businesslike.

"...The secret agreement was amended, at my insistence...In connection with Article 2, also, I succeeded in securing German agreement [200].

"...amendment was made to the following effect...The efforts of Director TOGO also succeeded in effecting amendment of the Annexed Secret Agreement in the following points..." [201]

200. Testimony of TOGO (T. 35,645-46).
201. Testimony of YAMAJI (T. 35,411).

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201. Testimony of YAMAJI (T. 35,411).

It is perfectly plain that the proposals made by Mr. TOGO were substantially taken into the final Pact; of course, the prosecution's "simple comparison between the proposals made by him and the final texts" show no difference, because they are comparing a thing with itself. The comparison to be made is, of course, between the original German draft and the final text.

39. The original draft is unavailable, but the substance of it, so far as it differed from the final text, has been given by the testimony, Mr. TOGO[202] and the (un-cross-examined) witness YAMAJI.[203] To summarize this evidence, the original draft contained much propagandistic, Nazi language and tone, all of which was removed in the rewriting and does not appear in the final Pact. The body of the Pact was originally of much wider scope in the cooperation to be undertaken by the contracting Powers vis-a-vis the Comintern; this was cut down to a provision for simple exchange of information concerning destructive activities of the Comintern and of opinions concerning counter-measures to be taken. The original draft provided a term of ten years for the Pact. This was reduced to five. In the secret agreement there were two major

202. Tr. 35,644-45
203. Tr. 35,411

alterations. First was the insertion of the word "unprovoked" in Article 1, which had originally called for the agreement's coming into operation "should one of the High Contracting States become the object of an attack or a threat of attack" by the U.S.S.R. Secondly, so many exceptions[204] were made from the requirement of Article 2 of the German draft (requiring mutual approval of the contracting of political agreements with the U.S.S.R.) as in effect to mutilate the article so far as concerned any limitation on Japanese action. Are these alterations "of little importance", "the final agreement" by them in no manner "altered in character"? Consider that list of exceptions, as it appears in evidence in the exchange of letters upon the conclusion of the Pact. Germany "fully agreed" that the "political treaties" referred to in Article 2 of the secret agreement -- those which should not be entered into with the U.S.S.R. without agreement of Germany -- included "neither fishery treaties nor treaties concerning concessions, nor treaties concerning border questions between Japan, Manchukuo and the Union of Soviet Socialist Republics and the like."[205] Fisheries, concessions, border questions: the entire

204. Exhibit 480, Tr. 5,936
205. Id., p. 1 (not read).

gamut of the important and troublesome Soviet-Japanese questions -- and Japan entirely freed of German meddling in them! Confine it, if you please, to consideration of one of these alterations, and to addition of one word: is there no difference of substance between agreements for action "in the event of attack by the U.S.S.R." and "in the event of unprovoked attack by the U.S.S.R."? Would it have in no way altered the situation of June 1941, when Germany attacked the U.S.S.R., the omission from the Pact of that word which Mr. TOGO inserted? As it chances, the insertion of that single word "unprovoked" into an analogous clause was the very action taken by the United States during the Japanese-American negotiations of 1941, to reserve its right to act in self-defense, and in self-defense only.[206] We must at the least apply the same canon of interpretation to this language of Mr. TOGO's; which being done, we arrive at the conclusion that his change in Article 1 of the secret agreement resulted in depriving it of any character which it might otherwise have had of a "very concrete alliance", and converting it into something, even weaker than that which he has described it as having been, "of strictly defensive nature." This

206. See Summation for the Defense, Section K, "The Japanese-American Negotiations", ¶¶ 16, Supra, Tr. 43,521.

simple comparison disposes at once of the question of the importance of his alterations and of the offensive character of the secret agreement.

40. Mr. TOGO's attitude toward the Anti-Comintern Pact in 1936 was in short just that which would have been expected of the man who in 1933 had urged that "it is by all means advisable that we make earnest efforts to improve our relations with the Soviet Union."[207] Moreover, the Anti-Comintern Pact being calculated, as he felt, to damage Japanese relations with the United States and Great Britain as well, he strongly urged the necessity of undertaking concurrently with its conclusion negotiations for ententes cordiales with them.[208] The suggestion was not cheerfully received by the military authorities, and it was only after great efforts by Mr. TOGO that their opposition was borne down and authorization obtained for undertaking negotiation even with England -- which negotiations were finally on the point of commencing when the entire plan was frustrated by the outbreak of the China Affair.[209] This position of Mr. TOGO's was urged from the outset, as is shown by the fact that his proposed policy in regard to the

207. Exhibit 3,609-A, p. 20, Tr. 35,369
208. Testimony of MORISHIMA, Tr. 35,487; YAMAJI, Tr. 35,413; TOGO, Tr. 35,647-48.
209. Testimony of MORISHIMA, Tr. 35,488-90; YAMAJI, Tr. 35,413-14; TOGO, Tr. 35647-48.

Anti-Comintern Pact itself already included the suggestion of a rapprochement with Great Britain, with a general outline of his intention, modeled on the familiar treaties of consultation.[210] Inasmuch as this significant aspect of Mr. TOGO's connection with the Anti-Comintern Pact is not disputed, but is wholly ignored by the prosecution, it is unnecessary to go into detail concerning it, and we may be content with stating the general outlines of his plan for Anglo-Japanese understanding. The negotiations with Britain were to deal with settlement of the China problem, the adjustment of Japanese and British commercial interests in the markets of the world, and the question of the international money market. Since, however, something more concrete than mere promises could be supposed to be necessary to convince Britain of Japan's sincerity, radical alteration of Japanese policy toward China was requisite. To that end concurrent Japanese-Chinese negotiations were proposed. Mr. TOGO had been able, by the time of the outbreak of the China Affair, to convince the civilian and military authorities concerned of the desirability of such negotiations; Foreign, War and Navy Ministry representatives had actually been dispatched to China and Manchukuo and had there obtained

210. Exhibit 3267, Tr. 29,885

the understanding of the Japanese military authorities, and preparatory arrangements were being made with the Japanese ambassador in London for the negotiations there.[211] As has been said, the China Affair brought the entire plan to nothing.

41. Lastly, the prosecution point out (though no longer, as once, with much confidence in its significance[212]) that Mr. TOGO attended the meeting of the Privy Council which approved the Pact.[213] It need be said only that a bureau director is still a bureau director when he attends as an "explainer" at the Privy Council; he does not participate, he does not vote; he explains if called upon to do so.[214] Not only was Mr. TOGO not called upon to explain this pact at any meeting, but (quite naturally, he not being an advocate of the Pact) the responsibility for explanations if required had been delegated not to him but to the Director of the Treaty Bureau. In fact, as the evidence shows, the explanations were made by the Premier and the Foreign Minister, and Mr. TOGO said nothing at any meeting.[215]

211. Testimony of MORISHIMA, Tr. 35,489; and YAMAJI, Tr. 35,413.
212. Tr. 5,852; 16,940.
213. Summation, WW-5, Tr. 41,877.
214. Testimony of MURAKAMI, Kyoichi, Tr. 29,132.
215. Testimony of TOGO, Tr. 35,649.

42. The adherence of Italy to the Anti-Comintern Pact, as is seen from the evidence, occurred almost a year after its execution by the original signatories.[216] The negotiations which resulted in Italian adherence were carried on in Europe, not in Tokyo; Mr. TOGO had already by the time that Italy's adherence was decided upon been relieved of the functions of his bureau and was actually not in Japan when the entrance of Italy into the Pact membership took place.[217] Italy, in any event, was never a party to (nor, as the prosecution concede, even informed of[218]) the secret agreement,[219] which alone the prosecution seem to contend to have been vicious. The prosecution's one-time position that Mr. TOGO was "one of those most instrumental in the realization of . . . Japanese Italian collaboration,"[220] supported by no evidence then, is now shown by uncontroverted affirmative evidence to have been but another resort to ipse dixit. In summation the prosecution have no word to say of any TOGO connection with Japanese-Italian collaboration.

43. Soon after the failure of the proposed negotiations for an understanding wit Great Britain,

216. Exhibit 36, Tr. 513.
217. Testimony of TOGO, Tr. 35,649-50; Exhibit 127, Tr. 791.
218. Summation, F-116, Tr. 39,465.
219. Testimony of TOGO, Tr. 35,649; Exh. 491, Tr. 6037.
220. Tr. 16,939

Mr. TOGO was designated Ambassador to Germany, in October 1937. On the subject of this appointment the prosecution have indeed excelled themselves:

"Any doubts as to the weight of the accused's allegations concerning his opposition to the Anti-Comintern Pact should be dispelled by the fact that he was appointed Ambassador to Germany within a year after the conclusion of the Pact. No government in the world would appoint as its Ambassador to a country with which it had recently concluded a close military and political alliance the very man who, and this is the inference we are invited to draw, had been throughout the strongest opponent of this alliance."[221]

The prosecution's history also is bad. Without troubling to search for an exact parallel, we may remind them of a rather well-known case which disposes of their theory that no government would send as ambassador one professedly (if privately) unfriendly to <u>rapprochement</u> with the power receiving him. Be reminded, then, of John Adams, in 1785, designated first minister of the United States to the Court of St. James, in which presided His Britannic Majesty George III, that monarch whom Minister Adams had but lately, in his contribution to a celebrated bit of rhetoric which we know as the

221. Summation, WW-6, Tr. 41,878

Declaration of Independen e, publicly apostrophized as "A Prince whose character is thus marked by every act which may define a Tyrant, . . . unfit to be the ruler of a free People."[222]

44. Mr. TOGO's appointment as Ambassador was considerably overdue in 1937; he had been promised the Moscow post in the spring of 1936 by the Premier, concurrently Foreign Minister, HIROTA, but when a new foreign minister was appointed he designated another to that place, giving as the reason the personnel problems of the ministry (this is undisputed in the evidence).[223] Mr. TOGO had himself requested, in the summer of 1937, that his appointment to an ambassadorship be still further postponed, in order to enable hi to work longer for the success of his policy of rapprochement with England (this is undisputed in the evidence).[224] When those efforts were finally frustrated by the outbreak of the China Affair, he would naturally be given an ambassadorship -- not one of his choice, from which the incumbent would be ejected to make place for him, but one in which a vacancy occurred. That was Berlin (if there had been

222. Declaration of Independence, USCA Const., Part 1, 6.
223. Testimony of TOGO, Tr. 35,635.
224. Id. Tr. 35,648

alternatives, of course, he knew the German language). To that post he was appointed by Mr. HIROTA, again Foreign Minister, who had earlier demonstrated his appreciation of Mr. TOGO's suitability for designation to Moscow in divulging his intention to send him there.

45. During Mr. TOGO's brief period of service as Japanese Ambassador to Germany -- ten months -- there were three matters which are important as bearing on the charges, at one time made against him, or on his intentions and motives, which are material here. Of these the prosecution discuss two. We shall discuss three. First of these is the question of his attitude toward the China Affair. To sketch the background briefly, German attempts at mediation between Japan and China, undertaken at Japanese request, had been in progress in Tokyo for some time, but were already on the point of abandonment as a failure at just about the time of Ambassador TOGO's arrival in Berlin.[225] While professing concern with strengthening friendly relations with Japan, however, and even while undertaking this mediation in the Sino-Japanese conflict, Germany had been supplying China with arms, munitions, instruction and technical assistance, and was thus,

225. Testimony of TOGO, Tr. 35,651-52; HORINOUCHI, Tr. 29,703-5; KIDO, Tr. 30,839.

in fact, herself engaging in war against Japan.[226] As the prosecution correctly state, Ambassador TOGO did not participate in negotiation on the mediation question; but he had been instructed by the Foreign Minister on the occasion of his departure from Tokyo for Berlin that he was to endeavor to effectuate the recall of the German military mission and the stopping of the shipment of arms to China.[227]

It was in this condition of affairs that Ambassador TOGO called on German Foreign Minister von Neurath on 10 January 1938, Neurath's record of which call[228] the prosecution discuss at some length in the endeavor to torture from it proof of aggressive intent of Mr. TOGO's against China. The defendant has testified that "I had called on von Neurath, as the memorandum shows, merely to tender the thanks of my Government for Germany's efforts by way of mediation between Japan and China . . ."[229] The Foreign Minister's memorandum shows that "The Japanese Ambassador referred to the mediation activities of Germany in the Sino-Japanese conflict when he called on me today. By order of the Minister HIROTA he expressed his thanks for our activities."[230] Mr. TOGO testified that von Neurath

226. Testimony of TOGO, Tr. 35,650-51.
227. Ibid.
228. Ex. 486-D, Tr. 5,991.
229. Tr. 35,651.
230. Ex. 486-D, Tr. 5,991.

"brought up the general question of the China Incident."[231] The memorandum of von Neurath says: "Making use of this opportunity, I have pointed out to Mr. TOGO the danger which might grow up in Japan on account of the too-prolonged war."[232] Mr. TOGO then stated what he contends to have been the Japanese Government's position toward the China Incident, what the prosecution allege to have been nothing of the sort, but "the desires and plans of those who advocated continuation of the war."[233] Characteristically, the prosecution made no effort to prove any communication of their views by "those who advocated continuation of the war", to Mr. TOGO in Germany; the argument goes on the assumption, apparently, that he had telepathic powers. At any rate, the prosecution's own statement proves the exact truth of Mr. TOGO's testimony. It needs only a reading of this passage of their summation to see that what Mr. TOGO said to von Neurath concides exactly with the decision of the Imperial Conference of the day following, 11 January, which he must therefore have had advance notification of, whether by wire or by telepathy:

"This division of opinion finally resulted in the Imperial Conference Decision of 11 January 1938,

231. Tr. 35,651.
232. Ex. 485-D, Tr. 5,991.
233. Summation, WW-6, Tr. 41,880.

which stated that an effort would be made for a settlement of the incident on the basis of specific Japanese terms and only in case this would prove unsuccessful to break with China and continue the war.

"It is in this light that the statements of the accused to the German Foreign Minister when he visited him on 10 January 1938 should be considered. He stated that Japan wished for peace and for the soonest conclusion of hostilities. However, Japan was determined to carry on the war to its bitter end and conditions of peace would become harder as the war continued longer. The Japanese Government no longer considered Chiang Kai-shek as representative of the Chinese Central Government. Japan was still willing to negotiate with him but if he was not willing to accept the Japanese peace conditions Japan would make peace with each of the provincial governors."[234]

Where is the contradiction? "Japan is still willing to negotiate with Chiang Kai-shek; but if he will not accept our terms, we will continue the war" -- that is the effect of the Imperial Conference decision, it is the effect of the Ambassador's statement. As he said to von Neurath, he was stating the Japanese Government's determination. Mr. TOGO further testified that

234. Id., WW-6, Tr. 41,879.

the policy of not dealing with Chiang and of fighting the incident to a military conclusion (as published a few days later in form of the "KONOYE Declaration") had already by then been substantially decided, and had been made known to him.[235] This Imperial Conference decision is eloquent evidence that that policy had been "substantially decided"; and that Mr. TOGO must have known of it is proved to demonstration by the accuracy with which he repeated its terms to von Neurath. If he was "expressing the desires and plans of those who advocated continuation of the war", it was only because those persons were able to control those decisions of Government and Imperial Conference which were forwarded to him.

THE PRESIDENT: We will recess for fifteen minutes.

(Whereupon, at 1445, a recess was taken until 1500, after which the proceedings were resumed as follows:)

235. Testimony of TOGO, Tr. 35,652.

Yelden

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Major Blakeney.

MR. BLAKENEY: Page 84, Section 46:

46. The second question of interest during Mr. TOGO's service in Berlin is that of Japanese-German economic cooperation in China. As it is stated by the prosecution:

"The accused's position in relation to Japan's aggression towards China during this period is also clearly shown in the negotiations which took place with Germany concerning German-Japanese cooperation in the exploitation of China. In his own testimony the accused attempts to make it appear that efforts to reach agreement in this respect were started by Germany in May 1938 and that he, being opposed to such an agreement, did his best to thwart these efforts, even going so far as not to follow, or at least freely interpret the express instructions of his government. The facts, however, are different." 236

The facts are not "different," however much the prosecution may clutch at straws in the effort to prove them so. Ambassador TOGO's conversations with Foreign Minister von Neurath of 10 and 28 January

236. Summation, WW-7 (Tr. 41881).

are pointed to as the evidence that he himself, the Ambassador, first brought up the subject, and was keen on it. We had best read the evidence, which evidently the author of this passage has not done. The German memorandum of the conversation of the 10th contains only this: "The Ambassador stressed then, in addition, that the Japanese are taking the greatest interest in working hand in hand with the Germans in China's economic development. There would be no exclusion of German trade in China, which was sometimes feared by German merchants."[237]

Is this probative of something important to Mr. TOGO's "position in relation to Japan's aggression towards China"? Was it not Japan's implied obligation under the Nine-Power Treaty which Mr. TOGO has testified to having had in mind in discussion of these economic questions with the German officials,[238] to work "hand in hand" with other countries in China's economic development, and to be party to exclusion of the trade of no country? Germany, of course, was not a signatory of the Nine-Power Treaty; not being a party, and thus not entitled even to most-favored-nation treatment, she had fears

237. Ex. 486-D, Tr. 5992.
238. Tr. 35656.

of total exclusion from the trade of China. The most that Mr. TOGO can be said to have offered here was that Japan, for her part, would in compliance with the spirit of the treaty not deny Germany access to that market. It is submitted that, as the evidence yet to be analyzed will disclose, his position was an eminently fair and proper one. He was unwilling to see even Germany excluded from the benefits of trade in China which it was the intention of the Nine-Power Treaty so far as possible to make available to all nations on terms of equality; but at the same time was adamant against permitting to her anything more than at best most-favored-nation terms, which would have given her preference over other nations.

Then, from the memorandum of the conversation of 28 January: "In the further course of the conversation which dealt no longer with the supposedly impending British feeler, Mr. TOGO mentioned that the moment would soon come when we would have to start talking about German cooperation with Japan in the New China which is to be constructed."[239]

Is "cooperation in China" synonymous with "exploitation of China"? Does anything appear here to

239. Ex. 486-I, Tr. 6019.

indicate either that Mr. TOGO was keen on the subject of this cooperation or that he was not? The whole thing is perfectly neutral, giving no support to an argument either way concerning the speaker's intentions (it must be borne in mind that the conversation was recorded, not by Mr. TOGO, but by the Germans, hence represents their view of the matter of the conversation which was of interest).

This document also serves the prosecution as proof of Mr. TOGO's having taken an eager initiative in the economic discussions. It will not have been forgot that, as the memorandum shows, the general question of China affairs had been brought up by the Foreign Minister, not the Ambassador, when the latter called on 10 January to express thanks for German mediation. Evidently on the 28th likewise--Ambassador TOGO having called on other business, again relating to mediation--it was the German representative, Weizsacker, who changed the subject to that of economic cooperation in China, as his own memorandum intimates.

47. We need not attempt further to interpret these remarks, which after all might mean much or nothing, for the subsequent events interpret them for us; but before coming to these, one or two

comments here. These remarks of Mr. TOGO's are said by the prosecution to have been made in the absence of "any evidence to show that he had had any instructions from the Japanese Government." Let us give the prosecution a little instruction in the principles of judicial proof, as they relate to this obsession of theirs with the idea that ambassadors, bureau directors--public servants in general--may be presumed, until the contrary be shown, on any given occasion to utter in their public capacities their private thoughts. It is a familiar principle in American law, one doubtless known in other jurisdictions, that public acts of a public official are presumed, until the contrary be shown, to have been regular and in accordance with the law and with usual practice. A contrary presumption would intolerably impede the processes of government, by requiring proof of the regularity of every act of an official before action could safely be taken in reliance upon it. The presumption must be indulged that an ambassador's statements are made under instruction; or is the Government to which he is accredited to inquire each time of his own Government? The presumption is, naturally, rebuttable; and we may even concede for purposes of argument that had the prosecution proved that it was

the habit and custom of the defendant to perform, as official, unauthorized acts, it might disappear altogether. But the prosecution cannot, simply because they choose to state it, create any such doubt in the absence of evidence produced by them to sustain their burden of proof--cannot shift to the defendant the burden of proving that every act of his career was performed in faithful conformity to his authority and orders. (A glance at von Neurath's memorandum of a conversation with Ambassador TOGO on 22 January, contained in the same document as that of the 28th quoted by the prosecution, will give strong confirmation of the presumption that the Ambassador had instructions to make these vague remarks to the German side about cooperation in China, and why--because of the importance to Japan of inducing German extension of credit and expansion of the volume of her trade with Japan.)[240]

48. What is clear is that in May 1938 the German approach was made with a view to securing Japanese agreement to special treatment for German trade in North China. The prosecution's reference to the "approach from the German side, which, if it came at all, was * * *"[241] is a reminder of their

240. Ibid.
241. Summation, WW-9 (Tr. 41882).

position that the testimony of witnesses who were not cross-examined or refuted by the production of rebuttal evidence can be expunged from the record by the pretense that it does not exist. The witnesses, this time, are Mr. TOGO himself and the Commercial Attache of his Embassy in Berlin, both of whom testified unequivocally and in detail to the German approach. Mr. TOGO said:

"Then in May 1938 Foreign Minister Ribbentrop communicated to me his desire to make an agreement to the effect that Germans engaged in trade in North China should be given substantially equal treatment in conditions of trade with Japanese traders. On receipt of this proposal I flatly declined to enter into any negotiations for the reason that I was not authorized to do so."[242]

Commercial Attache SHUDO supplied full details.[243] Notwithstanding this rejection of his advances, Ribbentrop drew up and presented to Ambassador TOGO another proposal, this time for "preferential treatment" for German trade. The Ambassador could only forward this, a second proposal, to his Government--and he did not fail to send with it his

242. Tr. 35655.
243. Tr. 35438-50.

opinion that any such agreement would in practice be impossible to carry out without violation of the Nine-Power and other treaties, and that he therefore opposed the granting to Germany of anything more than most-favored-nation treatment.[244]

49. In response to this statement of his views Ambassador TOGO received from Tokyo instructions to proceed with negotiations on Ribbentrop's proposal, and specifically to offer to Germany "the best possible preference," to undertake "not to put Germany in a position inferior to that of other countries," and even to promise that, "in setting up any import and export system, hereafter as far as Germany's economic activities in North China are concerned, Germany's interests will be fully respected and will be given preference over any third country." At the same time--perhaps as a result of Mr. TOGO's warning concerning violation of the Nine-Power Treaty--it was to be understood that Germany could not be allowed a position "equal to us or even inferior, if it gives them a preference which would threaten to cut off entirely the economic participation of England and America in the future."[245] On the basis of these

244. Testimony of TOGO (Tr. 35656) and SHUDO (Tr. 35444).

245. Ex. 2228-A, Tr. 15986; 15984.

instructions Mr. TOGO prepared and presented to the Germans a "Pro Memoria" embodying a Japanese counter-proposal.[246] This is the document in speaking of which Mr. TOGO--as the prosecution have it--"attempts to make it appear" that, as he testified, he narrowed down the proposals which he was instructed to present.[247] As commonly proves to be the case with the prosecution's comments on the significance of documents, a reading of the original is enlightening. When we look at the Pro Memoria we see that whereas the Ambassador had been instructed to offer Germany "the best possible preference," he wrote that Japan would "consider Germany particularly benevolently * * * and will at least grant to her the most favorable treatment that third powers (excepting Manchukuo) will enjoy."[248] The difference between the preference which Ribbentrop had in mind and this, equivalent to the most-favored-nation treatment embodied in countless international commercial agreements, as well as the significance of the change made by Ambassador TOGO, are self-evident. In addition, he replaced the reference to trade--"economic activities"--of his instructions with

246. Ex. 591, Tr. 6585.
247. Summation, WW-7, Tr. 41881.
248. Ex. 591, Tr. 6588.

"foreign trade,"[249] and amended his instruction, that he negotiate concerning "North China," to cover "China." No agreement was ever reached; Ribbentrop found these proposals wholly unsatisfactory,[250] and Ambassador TOGO, not being convinced of the propriety of offering more, was obstinate until his removal from the Berlin post.

50. The prosecution insist that Mr. TOGO's emendation of the proposal which he was instructed to make, by alteration of "North China" to "China," is evidence of his supporting an aggressive policy of Japanese domination of all China.[251] This argument rests on the wording of the memorandum of Wiehl, the German underling who purported to record a conversation with the Ambassador of 6 July, and in effect on one word in it; it is an argument which flies in the face of the logic of the circumstances and of all that we know of Mr. TOGO's attitutde to the China question in general. Wiehl says:

"(1) According to our suggestion the Pro Memoria was to refer to 'the areas of China which are under Japanese influence.' The Ambassador wishes to

249. On this point, yielding to German insistence, he finally amended his proposal to conform to the instructions, (Ex. 593, Tr. 6594).
250. Ex. 532, Tr. 6590.
251. Summation, WW-7 (Tr. 41883).

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250. Ex. 532, Tr. 6590.

251. Summation, WW-7 (Tr. 41883).

replace these words throughout merely by 'China' and brought up as a reason that the Japanese Government hoped to extend its influence over all of China, therefore it was for general reasons undesirable to acknowledge in this document the possibility of a division of China into areas which either were or were not under Japanese influence."[252]

The "therefore" is the dubious point. TOGO wished to replace "North China" by "China," giving as reason that Japan hoped to extend its influence over all China. So much is intelligible enough. There was war in China--which Mr. TOGO had neither been responsible for nor approved--Japan did hope to win it, and thus to extend over all of China that influence which she had always maintained was natural to her as a result of propinquity. At the same time, it was "for general reasons"--a separate reason: first the specific, then the general reason, different matters without Wiehl's "therefore"--it was for <u>general</u> reasons undesirable to recognize the possibility of a permanent division of China. This is obviously what he said, because Ambassador TOGO favored no permanent division of China; had opposed at all times any such division, but had at all times insisted that

252. Ex. 593, Tr. 6593.

"speedy restoration of good will" with China,[253] and recognition there of the principle of the Open Door,[254] were the prime necessities. This Pro Memoria itself, then under discussion--or dissension--between Wiehl and Mr. TOGO, most clearly shows Ambassador TOGO's unwillingness to make any agreement with Germany which should run counter to the Open Door principle of the Nine-Power Treaty:

"a) In future the Japanese Government will consider Germany particularly benevolently in her economic activities in China and will at least grant her the most favorable treatment that third powers (excepting Manchukuo) will enjoy. * * * This benevolent treatment of Germany, of course, does not exclude Japan's economic cooperation with third powers.[255]

This very memorandum of Wiehl has Mr. TOGO saying that "the Japanese Government could not promise us a better position than third powers and equal treatment with Japan regarding" taxes and the like.[250] In the conversation with Ribbentrop when the Pro Memoria was presented, and declared unsatisfactory, Ambassador TOGO had said that "the Japanese

253. Ex. 3609-A, p. 25, Tr. 35573.
254. Id., p. 26, Tr. 35483.
255. Ex. 591, Tr. 6587.
256. Ex. 593, Tr. 6594.

Government was not able to assure Germany a better position than all other powers in treaty form"[257] -- and never did give such assurance. Obviously, the Ambassador's Government was of a mind to allow to Germany a preference of some nature, but the Ambassador was diplomatically recalcitrant--it just couldn't be made to accord with his convictions. Yet if there is on the one hand not a trace of evidence that Mr. TOGO ever made any offer of a preferential treatment for German interests over those of third powers--all this "evidence" being, as the President of the Tribunal remarked when it was tendered, "the sort of material the defense might use to show lack of cooperation between Japan and Germany"[258] -- on the other hand there is no evidence, so far at least as Mr. TOGO is concerned, to support the prosecution's assertion that Japan refused "to allow any nation, even her ally, Germany, to infringe upon the monopoly" which she was trying to create in China.[259] And if Mr. TOGO was thus resolute to guard a monopoly and to exclude Germany from it, why were the prosecution so very intent just a moment since on proving from his words that he eagerly made

257. Ex. 592, Tr. 6588.
258. Tr. 6621.
259. Summation, WW-7, Tr. 41883.

advances to the Germans for cooperation in exploitation of China? Which, tell us, do you really wish to submit to the Tribunal as your belief of the facts which constitute his guilt of this capital charge? Did he collaborate with Germany for the exploitation of China, or did he refuse to consent that even Germany should be given illegal preference in China?

51. And if it were all word for word true, that Ambassador TOGO said just what the Wiehls, and Knolls, and the rest, recorded -- what then? How did the prosecution phrase it? "No diplomat has been charged in any instance because he carried out the instructions of the Foreign Minister."[260] Where is the proof that Ambassador TOGO, when he said these things -- or whatever actually he did say -- was not carrying out his instructions?

". . . the ordinary character of an ambassador as a conduit transmitting messages and information between his own nation and the nation to which he is accredited has been recognized. . . However, where a diplomat undertakes to bring about a change in his government's policy in favor of aggression, he becomes responsible for the formulation of the aggressive policy, if adopted, ceases to be a conduit . . ."[261]

Where is the evidence that Ambassador TOGO undertook to bring about a change in policy except in the direction of liberalizing it? There is, of course, none; all the evidence points the other way.

260. Summation, SS-4 (Tr. 40,541)
261. Ibid.

Why do the prosecution clutch at these straws, of quibbling interpretations of words, of distortions of language, of omissions, to try to hang a man? Why dwell on these trivia but to camouflage their failure of proof on the big points, on the issues in the case? That they could have no belief in these arguments had already become incontrovertible when the chief prosecutor announced that his abandonment of these charges represented their "concept of the guilt of TOGO or the lack of guilt."

52. I have just mentioned that Mr. TOGO had always opposed the permanent division of China. Perhaps this is the opportune place to remind the Tribunal of his insistence at the beginning of the China Affair upon a peaceful settlement of it. He was bureau director at the time; it need hardly be pointed out that neither the Foreign Ministry nor the Bureau of European-Asiatic Affairs created the incident. Indeed, the evidence discloses that the Foreign Ministry exerted itself to bring about realization of a policy of non-extension and prompt local settlement of the incident;[262] and Mr. TOGO was one of those Foreign Ministry officials parti-

262. Testimony of HORINOUCHI, Kensuke (Tr. 29,684)

cipating in a conference at which was decided the Foreign Ministry's attitude toward the Army's proposal of mobilizing troops for reinforcement of the China forces, which attitude was one of opposition to such measures.[263] Mr. TOGO was neither then nor at any other time directly charged with management of China Affairs, which were the business of the East Asiatic Bureau, but was concerned because of the interaction of questions of China with those of Japanese relations to Britain and America,[264] always his chief interests.

53. We have said that the prosecution have discussed two of the three important questions which arose during Mr. TOGO's ambassadorship in Berlin. The third they mention in this way:

"It is not contended by the prosecution that this accused took any part in the negotiations which were carried on during his ambassadorship in Berlin on the subject of strengthening the Anti-Comintern Pact."[265]

Really, this won't do! This disposition of the three-power alliance question would be well

263. Id. (Tr. 29,687); testimony of TOGO (Tr. 35,750)
264. Testimony of TOGO (Tr. 35,850) and MORISHIMA (Tr. 35,487-8)
265. Summation, SWW-8 (Tr. 41,884).

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enough had Mr. TOGO at the time been ambassador in Rio or Ankara. Were his defense simply that he had had neither knowledge of nor interest in the negotiations for an alliance, this approach might appear to be that of a prosecution intent upon fairness to the defendant consistent with narrowing the issues and eliminating from the case the irrelevant. But when Mr. TOGO was, as the Tribunal well knows him to have been, not Ambassador to Brazil, but Ambassador to Germany; when he was stationed in the very thick of the fray in Ribbentrop's Berlin where the alliance was being agitated; when he was no ignorant bystander, but one in the nature of things officially concerned, and from first to last the vigorous and uncompromising enemy of the alliance in such circumstances this approach does not enlighten the Tribunal. The prosecution have certainly a reason, the best of reasons, given their view of a prosecutor's function, for ignoring this opposition of his: because it undermines the whole theory of their case against the defendant TOGO, Shigenori which they are going to present to you a few pages later, in connection with his activities in 1941 and the years which followed. But they put in issue his aggressive, conspiratorial intent, and I have certainly a

reason -- the best of reasons, given my view of the issues of this case -- for destroying this falsehood which they would impose upon the Tribunal by suppressio veris.

54. It has been proved here beyond the peradventure of a doubt that of all Japanese in public office it was Ambassador TOGO who was the one categorical, unswerving in his opposition to "strengthening the Anti-Comintern Pact" -- to the forming of a German-Italian-Japanese alliance which that phrase implied -- to Naziism and all that it stood for, to the undertaking of any measures to deepen the intimacy with Nazi Germany. It has been testified to by witness after witness -- by thirteen of them at least -- that Mr. TOGO spoke against such plans officially and privately, in season and out that just as he had opposed such a policy in 1933 and in 1936, he opposed it in 1938, opposed it in 1939, opposed it in 1940 and 1941. It has been proved that he was so dead set against such a scheme that the Japanese military officials in his embassy in Berlin had to work for it in secrecy from him, that so obstinate was his opposition that he was in the end dismissed from his post and removed to another where he might have been supposed

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powerless to interfere. These facts have been testified to by the defendant TOGO himself, at length;[266] by the defendant KIDO (for even in Japan it came to be known that the Ambassador had to be circumvented);[267] and by the defendant OSHIMA, then military attache to the Embassy in Berlin, the man who best knew whether and why the Ambassador was circumvented, because he circumvented him.[268] The facts have been testified to by Heinrich Stahmer, liaison official of the German Foreign Ministry with the Japanese Embassy in Berlin,[269] and by Kurt Meissner, long-time non-official German resident in Tokyo.[270] They have been testified to by SAKAYE, Tadashi, First Secretary to the Embassy under Ambassador TOGO;[271] by SHUDO, Yasuto, Commercial Attache in the Embassy;[272] by NARITA, Katsushiro, Third Secretary;[273] by Lieutenant-General KASAHARA, Yukio, General Staff representative in Berlin who secretly brought to Tokyo the proposals for tripartite alliance -- secretly, because Ribbentrop knew that Ambassador TOGO would oppose it if he knew of them.[274] They

268. Exhibits 478 (Tr. 5917) and 497 (Tr. 6050)
269. Tr. 24,468-74
270. Tr. 35,460-3
271. Tr. 35,453-55
272. Tr. 35,439-42
273. Tr. 35,391-95
274. Tr. 35,429-31

266. Tr. 35,657-60
267. Ex. 2262 (Tr. 16,225)

were testified to by Minister ITO, Nobufumi, sent specially to Europe in 1939 to work on the tripartite alliance problen,[275] and by TOMIYOSHI, Eiji, Member of the House of Representatives to whom in 1940[276] Mr. TOGO spoke as fellow-countryman and friend. These things were testified to by General UGAKI, Kazushige, prosecution witness and honest man, the then Foreign Minister of Japan to whom Ambassador TOGO's opposition -- opposition to such an alliance directed against any countries whatsoever -- was officially expressed[277] by Admiral OKADA, much-trusted prosecution witness, former Premier of Japan who as Elder Statesman recommended Mr. TOGO's appointment[278] as Foreign Minister in later years. There cannot be the slightest, faintest suspicion of a lingering doubt whether Mr. TOGO was, is and always had been opposed to a political orientation of Japan toward Nazi Germany. And how curious, for the ardent advocate of the Anti-Comintern Pact -- significant as that first step, of a few short years before, toward alliance with Nazi Germany[279] -- whom the prosecution have depicted for the Tribunal's edification.

275. Tr. 35,458-9
276. Tr. 35,522-3
277. Tr. 34,912-3
278. Tr. 37,166-7
279. Summation, SF-109 (Tr. 39,456)

55. Opposition to the alliance with his Nazi hosts brought Mr. TOGO's career in Berlin to an inglorious end. He has testified to the facts showing that his stubbornness in this matter was the cause of his transfer to Moscow in October 1938 -- a transfer which, long though the Moscow post had been his goal, he declined, hoping to remain in Berlin to sabotage further efforts for rapprochement with Germany, until he was peremptorily "requested" to accept appointment to the new post.[280]

His translation to Moscow did not put an end to the fight; so far as opportunities could be found or made, he continued interfering to express his opposition to what, it had by that time come to be clear, was to be a tripartite military alliance.[281] He charged diplomats returning to Japan to make his opinion known in influential quarters.[282] So keen was he to object on every possible occasion that when, in February 1939, Ambassador OSHIMA invited to a conference in Berlin, to discuss tripartite alliance, Japanese ambassadors and ministers in Europe, Mr. TOGO did not even wait for authorization

280. Testimony of TOGO (Tr. 35,660). "TOGO allegedly advised Foreign Office of his objections to Tripartite Pact" (Pros. Sum §QQ-26 (Tr. 41,492). "Alleged" by the adviser and the advised (testimony of UGAKI Tr. 34,912), neither of them cross-examined nor contradicted.
281. Test. of SHUDO (Tr. 35,441) and ITO (Tr. 35,459)
282. Testimony of SHUDO (Tr. 35,441-2)

from the Foreign Ministry to attend, but departed precipitately for Berlin to register his opposition.[283] Arriving there, he found that the Foreign Ministry had disapproved of General OSHIMA's little conversazione, but he availed himself of the opportunity thus afforded to express his views once again to Ambassadors OSHIMA and SHIRATORI, as well as to Minister ITO who at the time was in Berlin on his mission from Tokyo to convey the Japanese Government's views of the alliance question.[284] In connection with this meeting General OSHIMA preferred to testify under cross-examination that Mr. TOGO went from Moscow to Berlin "at his own initiative," rather than at the General's suggestion.[285] While if true it would only be to Mr. TOGO's credit that of his own initiative he made the trip to oppose alliance with the Nazis, General OSHIMA's testimony on this point cannot be taken seriously. The truth of his statement can be tested by his further testimony that Mr. TOGO's arrival was after the visit of the ITO Commission,[286] testimony which is in direct contradiction to that of Messrs. TOGO and ITO that they talked together in Berlin at that time, which would scarcely

283. Testimony of TOGO (Tr. 35,660-1)
284. Ibid.
285. Tr. 37,124
286. Tr. 37,122-3

~~have been possible if Mr. TOGO had arrived in Ber-~~
lin only after the visit of the ITO Commission.
This little inaccuracy is mentioned for its bearing
on the probabilities as between Mr. TOGO's testimony
and that of General OSHIMA and his witnesses when
they differed on other points.[286a]

56. Whether this voice of Cassandra which sounded so often its rude and ominous note, forcing itself on the notice of higher circles, was a cause of the break-down in 1939 of negotiations for the military alliance, we cannot know. As for 1940, and the conclusion of the Tripartite Pact of that year, that deed was (as the Tribunal knows[287]) performed in an atmosphere of such deep secrecy and mystery that there was no opportunity for objection or warning. It is nonsense for the prosecution, in suggesting that no defendant in September 1940 dissented[288] in principle from the conclusion of the pact, to imply that Ambassador TOGO in Moscow had knowledge that it was being concluded, approved its conclusion or had abated jot or tittle of his long-standing antagonism to it.

We shall return to the subject of the

287. Tr. 24,404
288. Summation, §§F-123, F-143 (39,472-3, 39,499-500)
286a. CF. OSHIMA Summation, §17-28 (Tr. 46,808-27)

Tripartite Pact and Ambassador TOGO.

57. Finally, when Mr. TOGO became Foreign Minister in 1941 he again had connection with the Anti-Comintern and Tripartite Pacts, in two ways. First, he became ex-officio a member[289] of the general commission which the Tripartite Pact provided should in each of the capitals be constituted of the local Foreign Minister and the ambassadors of the other signatories.[290] It is too obvious to need mention that the Foreign Minister's views or ideology did not enter into his designation to this commission; it is undisputed that the commission in Tokyo never met while Mr. TOGO was in office.[291] The prosecution, indeed, concede that these general commissions did not function;[292] whether their explanation for the failure is the correct one we are not concerned to investigate (in fact, the general German-Japanese non-cooperation shown by all the evidence will suffice as commentary on this point).

58. Secondly, the Anti-Comintern Pact was also renewed and extended for a further term of five years during Mr. TOGO's foreign ministership.[293] This

289. Exhibit 128 (Tr. 791)
290. Exhibits 43 (Tr. 513) and 559 (Tr. 6418)
291. Testimony of TOGO (Tr. 35,665)
292. Summation, SF-152 (Tr. 39,511)
293. Exhibit 495 (Tr. 6,046)

representing, with the exception of one point, no new policy, but the continuation of the policy in effect since 1936, Mr. TOGO's connection with it evidently is that described by the prosecution when they say that "no man has been charged in this proceeding because of any act committed or statement made by him in the course of his official duties pursuant to an already established policy."[294] Incidentally, even the extension of the Pact was at the time of Mr. TOGO's taking office already decided policy; Foreign Minister MATSUOKA had in the spring of 1941, during his visit to Berlin, committed Japan to the renewal.[295] A few additional nations adhered to the Pact at the time of its renewal; but, as the prosecution point out, new adherences were of less importance than "the strengthening of the substance of the Pact."[296] We have just seen what support Mr. TOGO had given to the "strengthening" of the Anti-Comintern Pact in the years 1938-1941.

The point, mentioned above, in which the extension of 25 November 1941 was not a continuation of policy already in effect was that when it was ex-

294. Summation, §S-3 (Tr. 40,539)
295. Exhibit 2,694 (Tr. 23,562-4)
296. Summation, §F-117 (Tr. 39,465)

tended the secret protocol was abrogated. This abrogation Mr. TOGO achieved through his efforts. The significance of Foreign Minister TOGO's thus taking the only measure open to him to weaken the ties with Germany will not have escaped the Tribunal's attention. For the evidence is clear that it was entirely as the result of his insistence that the secret agreement was abrogated;[297] this is true despite a contrary assertion in summation which is one of the most extraordinary examples of this prosecution's irresponsibility. They have this to say:

"The defense evidence, through witnesses, that it was only through the personal efforts and initiative of the accused that the Secret Protocol was abrogated is clearly contradicted by his own statements to the German Ambassador at the time."[298] Where is the evidence? The citation given is to exhibit 3835. That exhibit as tendered contained the language: "And, as to the abolition of the secret agreement, I fall in with your view," which would perhaps have given some slight support to the assertion that Ambassador Ott had raised the point --

297. Testimony of TOGO (Tr. 35,663), NISHIMURA, Kumao (Tr. 23,563) and MATSUMOTO (Tr. 35,466).
298. Summation, SWW-27 (Tr. 41,914)

enough to make it arguable, if not "clear." But the translation was questioned; the Tribunal's language arbitration board made the correction, before the document was admitted into evidence and in the hearing of the prosecution who offered it and who now writes this summation: "And, as to the abolition of the secret agreement, I favor it."[299] The defendant TOGO is on trial for his life.

We need not discuss Mr. TOGO's reasons for desiring abrogation of the secret agreement. The "changes in circumstances" rendering it unnecessary as he stated them, without elaboration, to the Committee of the Privy Council, were three: That Germany was at war with the USSR, which was a fact; the existence of the Japanese-Soviet Neutrality Pact, which was a fact (though the prosecution omits mention of this reason in stating the evidence),[300] "formation of alliance between Japan and Germany."[301] If this last refers to the Tripartite Pact (the prosecution distort this third reason into the Tripartite Pact had superseded this one"), its existence too was a fact, one concerning Mr. TOGO's feeling toward which there can be no question. It cannot be contended that he favored it. There can be no

299. Tr. 38,066 CF. the testimony of Hogen (Tr. 28,837) and Ex. 3902-A (Tr. 38,846).
300. Summ. SWW-27 (Tr. 41,914)
301. Ex. 1182 (Tr. 10,396)

suggestion that he could abrogate it. There can be no contention that he could declin at his caprice to carry out the renewal of the Anti-Comintern Pact to which his Government was already committed. He could secure abrogation of the secret agreement, and he did. The Tribunal is in a position in view of his past attitude to the German alliance in its every part, to judge correctly of his motives. It remains to be added that when he could find grounds for urging abrogation of the Anti-Comintern Pact itself, he did urge it, and successfully, in May 1945.[302]

We submit that there is not a scintilla of evidence in the case to justify the incessant harping on the theme of the defendant TOGO's friendliness to German-Japanese collaboration, but that on the contrary the Tribunal must adjudge him to have been the most untiring, energetic, and effective opponent of that popular policy throughout its entire history of the 1930's and 1940's.

302. Testimony of TOGO (Tr. 35,663)

Whalen

THE "CONSPIRACY"

59. We have now reached the period of Mr. TOGO's first term of service as Foreign Minister. It being the prosecution's announced belief that he should have been charged only for his actions from the time of his entry into the TOJO Cabinet, from which time they contend him to have entered into their "conspiracy",[303] this appears to be in their eyes the only sustainable part of their case against him. The prosecution seem to propose also, however--although it is not possible to comprehend exactly what their position is--the imposition upon him of some guilt, legal or moral, for all acts performed by his "fellow conspirators" from 1 January 1928 to 2 September 1945.[304] I say that this is impossible to comprehend because, while once saying that for those acts "we do not claim a conviction," they continue that "from the conspiracy point of view he must be held to have adopted" them;[305] and "in our submission a man who joins the conspiracy late may adopt the fruits of the conspiracy as he finds them and thereby approve after the event(a) policy which he did not support at the time."[306]

I have no intention of repeating here what has

303. T. 35,347.
304. T. 35,352.
305. Summation, SC-20 (T. 39,053).
306. Id., SC-16 (T. 39,049).

been said elsewhere concerning the non-existence of conspiracy as an offense known to international law, the impropriety (if this new branch of the law of nations is to be created) of adopting with the crime from the Anglo-American law all of those accompanying paraphernalia and ramifications which have rendered it as a doctrine so abhorrent to jurists of every school, not excluding those of America and England. The facts of this case, as disclosed by our consideration of the record up to this point, constitute a far more eloquent argument against that course than anything which I might say: how a more shocking proposal could be devised than that of imposing responsibility of any nature for the Tripartite Pact, to mention one example, upon the most aggressive opponent anywhere of that Pact and the policy represented by it, it is impossible to conceive.

I do wish, however, to discuss briefly the charge of conspiracy, and the proof which is alleged to sustain it, as against this defendant.

60. The prosecution's position concerning this defendant's connection with their "conspiracy" is patently not only untenable and shocking, but even ridiculous. We have only to read the words of the

chief prosecutor in expounding it to discover its self-contradictory character:

". . .the prosecution desires to state at this stage that, subject to the following reservation, it seeks conviction of the accused TOGO for his actions beginning with his assumption of duties in the TOJO Cabinet.

"This is not in any manner an abandonment of any charges of his joining at such date in any conspiracy described in the Indictment, commencing at a previous date."[308]

. . . . .

"THE PRESIDENT: Well, do we understand it is the contention of the prosecution, or the admission of the prosecution, that he did not join in any conspiracy before he joined the TOJO Cabinet?

"MR. KEENAN: It is precisely that, Mr. President, . . . with the further observation that, as a matter of law, it is our contention that he is guilty if he joined the conspiracy during October of 1941. And we believe that it is our duty to so state to the Tribunal that that is our belief and that is our concept of the guilt of

308. T. 35,347.

TOGO or lack of guilt . . ."[309]

. . . . .

". . . the prosecution will not press charges other than those which will be clearly set forth, I think, and I believe amply in the record, as it will appear in these proceedings when transcribed."[310]

If the prosecution's "concept of the lack of guilt" of Mr. TOGO finds its expression in these words, that he "joined the conspiracy" only in October 1941, on what rational basis can the prosecution reserve a right to contend that "as a matter of law he is guilty," that "from the conspiracy point of view he must be held to have adopted" criminal acts performed theretofore? If their "concept" is that he is not guilty, they do not believe him to have "adopted" those acts; if they believe him to have "adopted" those acts in such a way that he should be liable for them, they are confessing to dereliction of their duty if they do not "press the charges", do not "seek his conviction." Assertion of a liability even from the date of entry to that of departure from the circle of "conspirators" would be comprehensible; this position is not. If the prosecution's "concept of the guilt of TOGO" is that no guilt existed

309. T. 35,352.
310. T. 35,358.

prior to his joining the "conspiracy," by what logic--leaving morality out of question--can they contend for imposing upon him a vicarious liability for the thirteen years preceding that date? What justification can law, logic, morality or common decency give for the offer to hold a man responsible for the acts of others, acts with which he was not connected, acts which he fought with every weapon available to him? There is, and can be, none.

61. Let us examine the prosecution's method of proving the "conspiracy" against Mr. TOGO. As we have already heard, the prosecution are to contend that he is liable for the conspiracy's results "if he joined the conspiracy during October of 1941." Here, then, we have a good, solid question of fact: did he "join the conspiracy" during October 1941? Here we have a fit subject for evidence, or reasonable deductions from evidence. What is discoverable in the summations--and the Tribunal is assured that I have searched them--is the constant smug assumption, of which I have mentioned too many examples before now, which begs the question at issue. The circuity of reasoning by which this "conspiracy" would be established is apparent on every page of those summations. It goes like this: "Mr. TOGO, we admit, committed no crime and participated in no

conspiracy prior to October 1941. Entering the conspiracy in that month, he adopted the prior criminal acts of his co-conspirators; having adopted them, he became liable for their total effect, which is a conspiracy. He must therefore be adjudged guilty of all such criminal acts, because of having entered the conspiracy the object of which was to commit them." Which is where we entered the circle. Entrance into the conspiracy imposes guilt for the acts; the guiltiness of the acts establishes participation in the conspiracy.

The prosecution have stated, in a general summation on the subject of liability,[311] principles with many of which it is impossible to differ--though the proposed applications of those principles are much distorted in a transparent effort to insure snaring all these defendants without regard to the actualities of their responsibilities. Still and all, the document is patently written by a lawyer, and if even the principles there stated in a somewhat Olympian tone had been followed in preparation of the individual summations we should not now be confronted with much of the preposterous sort of thing in question. But they were not. We can reduce to interrogatory form the prosecution's position in this matter as it can actually be

311. Summation, Section "K", "The Liability of the Defendants" (T. 40,538-66).

found in the summations--as, indeed, it permeates the summations:

Q Was "X" a conspirator?

A Yes.

Q The proof?

A He conspired with the others.

Q How?

A By doing the things we've proved.

Q The proof of their criminality?

A That they were done by the conspirator, "X". That is, of course, fantastic; but lest I be suspected of facetiousness, look at a concrete example. The prosecution are speaking, discussing the evidence put in by the defendant TOGO concerning his activities prior to "his assumption of duties in the TOJO Cabinet." "All it establishes--if that," they say,

> "would be that the accused did not at all times actively participate in furthering the conspiracy either because his official position, or lack of position, did not enable him to do so or because he temporarily disagreed with certain actions taken by the other conspirators."

312

This gibberish can be explained on no other hypothesis than that mentioned above--that the status of conspirator

312. Summation SWW-2 (T. 41,869-70).

is assumed ab initio. The prosecution here discuss evidence of the absolutely guiltless and actively honorable character of this defendant during the entire period in question--evidence negativing any idea of his being a conspirator. They have offered no simulacrum of evidence either to refute this or to prove commission by him of other, and criminal, acts during the same period. Proof that he was "unable" to participate in a conspiracy, proof that he "temporarily disagreed" with its progress, there is none, nor the breath of a suggestion to such effect. But to this prosecution, to these latter-day Daniels, all this is nothing: if every act of his life was against evil, until for one day he held public office, he was but "temporarily in disagreement" with the forces of evil, but biding his time--waiting to become a conspirator when this prosecution should see fit to charge him as such. No need to prove it; state it often and audaciously enough and it will come to be accepted as axiomatic--"TOGO is a conspirator, TOGO is a conspirator, TOGO is a conapirator! All his evidence proves is that he is trying to hoodwink the Tribunal by concealing his guilt." How childish it is, when a prosecution should be analyzing the evidence to ascertain whether their charges, hastily made ex parte, can be sustained, that

instead they assume the question at issue, pretend not to have heard the evidence which destroys their theory, and blandly attempt to justify even those charges which they had already once abandoned! What a laughing-stock they invite the Tribunal to make of itself by acceptance of such puerilities!

The basic premise once assumed, a plethora of further assumptions is spewed forth without let or hindrance.

". . . it is significant to note that at no time during the entire course of the conspiracy did any of the accused differ with the others on the fundamental object of the conspiracy itself. All of the conflicts which the evidence has shown were based solely on a difference among the accused as to whether certain action being contemplated at a particular moment was properly timed."
313

One would expect columns of citations to the evidence to support such an important and sweeping statement as this; need the Tribunal be told that there is no citation? Or need the calculated falsity of the statement be even pointed out, in view of the evidence which we have been discussing?

313. Summation, §30 (T. 38,973).

Once a "conspirator" had "joined the conspiracy"--by nomination of the prosecution--he will have to make a career of divesting himself of his membership and his responsibility for others' acts:

> "A man who has once joined the conspiracy cannot therefore absolve himself from responsibility for the subsequent actions of his co-conspirators merely by showing that he was not personally in favor of a particular action which they took especially if his opposition was based on mere prudential grounds, provided that action was within the scope of the original conspiracy, and he did not definitely disassociate himself from it.[314]
>
> "If he was out of office at the time and made clear his objection to the particular war to the extent of disassociating himself from the conspiracy although it was within the scope of the original agreement, we would concede that he should not be convicted . . ."[315]

How is it performed, this disassociating oneself by disassociating oneself? Not by voicing firm and reasoned objection--that is but to be in "temporary disagreement with certain actions," to believe the action

314. Summation SC-17 (T. 39,050).
315. Summation SC-24 (T. 39,058).

"not properly timed." Perhaps by notice in the press?

"Having as from today disassociated himself from the Greater East Asia Conspiracy, the undersigned will no longer be responsible for its acts."

62. Of course, the explanation of all this devious maneuvering is that the prosecution's "conspiracy" is wholly a creature of their imagination. The Tribunal has not sat here for twenty-three months without discovering that the attempt to prove in Japan the existence of a conspiracy, just because there did exist the Nazi conspiracy in Germany, was one ill-conceived in theory, a dismal failure in practice. The prosecution's summations constitute the confession that it did not exist. Their "conspiracy" started out promisingly enough; it was not to be a constructive thing, not the product of assumption, but was to be shown by proof of "a really carefully planned conspiracy or common plan for commission of the crimes set forth in the Indictment." 316 The pointing out of the plan has, however, somehow been overlooked even in summation, where the prosecution can scarce be said to shrink from supplying the want of evidence by bold assumption. True, the prosecution continue from the promise quoted to refer

316. Summation, §30 (T. 38,972).

with casual familiarity to "the basic plan", "the original agreement." True, various events of seventeen years are, when the prosecution find them objectionable, readily discovered to have happened "according to plan"; but this is only thinly-disguised induction. Where is the plan? Where is that agreement, or any evidence of it? The whole proof of "plan" and "agreement" consists of nothing more than the showing of the course of events of 1928-45: the "conspiracy" has appeared long since to be wholly constructive, the liability purely vicarious.

The much-vaunted "conspiracy", when divested of all the pseudo-legal jargon in which it has been so tenderly wrapped, amounts to this, as is perspicuously apparent from the prosecution's summations and cannot be disseminated: that the holding of public office of the Japanese nation, performance of any function of that office, constitutes a man a conspirator if the prosecution choose so to anathematize him. The hastiest glance at the summations makes clear that the prosecution have confessed it at last: they would indict the Japanese people. What Japanese was not a "conspirator?" Here is a pretty accumulation of them: all members of the TOJO Cabinet, but also of the KONOYE Cabinet, its

317. Summation, SG-115 (T. 39,654).

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predecessor[318]-- and especially Prince KONOYE himself[319], his Foreign Minister TOYODA[320] and Navy Minister OIKAWA[321]; the Privy Councillors[322] and the Elder Statesmen[323], of course including the one witness their "great confidence and respect in" whom the prosecution have publicly announced. In short, all Japanese premiers and their cabinets, and inevitably, the Genro Prince SAIONJI who selected the conspiratorial premiers[324]--but why extend the list? Usually it is "the conspirators", tout court, in contexts leaving the meaning all-embracing and universally vague, designating everyone and no one. The plain demonstration that for the prosecution the test of entering the "conspiracy" is the taking of office may be seen from the circumstances of their limitation of the case against Mr. TOGO: the charges against him were to have been pressed only from the time he became Foreign Minister. Not from the time of commission of any act by him vis a-vis another country; not of his expression of any opinion or statement of policy; not, by all means, of his being shown to have agreed to anything

318. Id., §§G-51--G-112 passim (T. 39,579-652).
319. Id., §§G-81, G-115 (T. 39,618, 39,654).
320. Id., §G-115 (T. 39,654).
321. Ibid.
322. Id., §F-147 (T. 39,505).
323. Id., §G-131 (T. 39,679).
324. Compare Summation, §§I-3--I-5 (T. 39,977-83) with §18 (T. 38,962).

with anyone: just starkly, nakedly, when he became Foreign Minister.

63. The chief prosecutor stated once to the Tribunal that

"the accused who are in the dock are the people we believe are really responsible for this war. If there had been anyone else, they would have been in the dock, too." 325

They wouldn't, of course; these summations name many others whom the prosecution now profess to believe guilty--many living and available, some actually utilized as prosecution's witnesses, others held for rising three years in Sugamo Prison, and no charges filed against them--none of them charged in any proceedings. The "conspirators" are in fact those "divers other persons unknown" of the old formal language--but in this case forever to remain unknown, for they do not and never did exist. The gigantic Japanese conspiracy was a phantasmagoria conceived in the mind of the prosecution, and never had substantial existence outside it.

THE PRESIDENT: Well, you come into an entirely new section. We will adjourn until half past nine tomorrow morning.

(Whereupon, at 1600, an adjournment was taken until Wednesday, 14 April 1948, at 0930.)